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In The Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969), this Court held that the First Amendment only permits regulation of student speech upon a showing of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." This Court has since recognized other narrow categories of student speech that may be limited without a showing of substantial disruption: speech that is sexually explicit, indecent, or lewd (*Fraser*); is school-sponsored (*Hazelwood*); or advocates illegal drug use (*Morse*). In conflict with the Second and Third Circuits, the Fifth, Sixth, and Ninth Circuits have held that content-neutral regulations of student speech are not subject to the general rule of *Tinker*. The questions presented are:

1. Whether, notwithstanding *Tinker*, public schools may, consistent with the First Amendment, broadly impose content-neutral and viewpoint-neutral restrictions on student speech as long as the restrictions satisfy the lower standard of intermediate scrutiny normally applied to expressive conduct, and not to pure speech.

2. Whether the intermediate standard enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968), is satisfied when, contrary to *O'Brien*, the court does not require the government to demonstrate that the regulation at issue actually furthers an important government interest or that it is no greater than necessary to serve such an interest.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Paul T. Palmer, by and through his parents and legal guardians, Paul D. Palmer and Dr. Susan Gonzalez Baker. Respondent is the Waxahachie Independent School District.

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STATEMENT

This case is an optimal vehicle for resolving an exceptionally important question that has divided the lower courts: whether the framework for student-speech claims established by this Court over 40 years ago in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), may be set aside, and a different standard of constitutional scrutiny applied, to regulations of student speech deemed content and viewpoint neutral. This Court's review is necessary to resolve the conflict and clear up the pervasive confusion among the lower courts (not to mention among school officials, students, and parents) regarding the scope of student-speech rights under *Tinker*. No set of facts—undisputed in the courts below—could more squarely frame the issue than those presented in this case.

If left undisturbed, the Fifth Circuit's decision not only threatens to vest government-run schools with virtually unfettered authority to censor student speech. It also threatens to extend the reach of government's ability to restrict protected speech into other contexts beyond schools. This Court's review is necessary to resolve the conflict, restore the sensible balance the Court has struck between the rights of students and the responsibilities of educators, and prevent the systematic application of a defective analytical framework for determining when restrictions on student speech violate the First Amendment.

1. During the 2008 presidential campaign, Waxahachie Independent School District ("WISD") officials informed Paul T. "Pete" Palmer—then a sophomore at Waxahachie High School—that he would be punished if he expressed his political support for then-presidential candidate and former U.S. Senator John Edwards by wearing a t-shirt emblazoned with the words "John Edwards 08" and "www.johnedwards.com" to class. App. 42; R.431-32 at ¶¶ 7-9. School officials explained to Pete's parents that the political message on Pete's shirt was not prohibited because it was offensive, but because it contained "unapproved words" under the school district's policy. R.432-33 at ¶ 10. At that time, the policy allowed "WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts." App. 37.

For several months, Pete and his parents unsuccessfully sought redress through WISD's grievance process. App. 42-47. Ultimately, the superintendent rejected their appeal, acknowledging that "Pete was disciplined for wearing a t-shirt with the logo 'John Edwards 08' emblazoned on the front," but reiterating that WISD's policy allowed students to express messages on their t-shirts concerning "WISD clubs, organizations, sports, or spirit * * * [or] college[s] or universit[ies]" but no others, including political messages. *Id.* at 42-43.

2. After deciding that further appeals within WISD would be futile, Pete filed this action by and through his parents in the Northern District of Texas.

App. 2; R.434-35. The original complaint alleged a claim under 28 U.S.C. § 1983 that the school district's censorship of Pete's political speech violated the First Amendment, and sought declaratory relief, preliminary and permanent injunctive relief, and nominal damages. App. 2.

In its answer, WISD admitted that Pete's "political message" presented "no concrete threat of 'substantial disruption or material disturbances to school activities.'" App. 2-3; R.298. WISD also admitted that Pete's political message was not "sexually explicit, indecent or lewd," "was not communicated as part of a school-sponsored activity," and "does not promote the use of illegal drugs." *Id.* at 3. In its response to Pete's preliminary injunction motion, WISD conceded that Pete's speech "is indisputably political in nature." R.218. And in its motion to consolidate the hearing on the preliminary injunction motion with "the final hearing on the merits," WISD stated that "[t]he facts are essentially uncontested, and the legal positions of the parties on the merits need no further development by way of discovery* * * *" R.245.

3. At the preliminary injunction hearing, WISD's assistant superintendent, Mr. Truitt, testified in response to questions by the district court that, on its face, the school district's policy of prohibiting students from expressing political messages on t-shirts did not apply to prohibit political messages on polo shirts. Tr.75:16-20 (R.83). Prompted by the district court, WISD represented it would not enforce its existing policy to prohibit Pete from wearing a

polo shirt emblazoned with "John Edwards" or any other political message for the remainder of the school year. Tr.83:1-7 (R.91). The district court denied Pete's preliminary injunction motion without prejudice. App. 3; Tr.84:25-85:9 (R.92-93).

The district court ordered WISD to finalize and submit its new policy for the 2008-2009 school year by June 1, 2008, instructed Pete "to make a request to wear specific attire" under the new policy within seven days after that, and ordered WISD to "respond to that request." Tr.85:8-9 (R.93).

4. In May 2008, the school board approved its new policy. App. 3, 30-36. That policy, which is still in effect, purports to ban all "slogans, words, [and] symbols" on clothing, but makes exceptions for messages that "promote the school district and its instructional programs." *Id.* at 30-31. Although WISD's policy no longer allows "college or university t-shirts," it continues to make exceptions for "campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school 'spirit' collared shirts or t-shirts." *Id.* at 31.

As directed by the district court, Pete submitted a written request to WISD that he be allowed to wear three different shirts to class. App. 4. Pete enclosed three shirts with that request: (1) a polo shirt displaying the words "Freedom of Speech" on the front and the text of the First Amendment—"Congress shall make No Law * * * abridging Freedom of Speech"—and "First Amendment" on the back; (2) another polo shirt

displaying the words "John Edwards 08" on the back; and (3) the original "John Edwards 08" t-shirt. *Ibid.* WISD denied Pete's request as to all three shirts. *Ibid.* WISD stated that even if Pete were to seek an exemption "based upon Pete's desire to express his personal political preferences, such a request would be denied." R.525 at ¶ 8; R.548.

5. In light of those representations, Pete filed an amended complaint and a second motion for a preliminary injunction. App. 4. Pete's amended complaint seeks relief identical to that sought in his original complaint. In its answer to the amended complaint, WISD once again admitted that Pete's political "messages" are "not disruptive." R.519 at ¶ 44.

6. At the hearing on Pete's second motion for a preliminary injunction, WISD's witness, deputy superintendent Mr. Truitt, confirmed that Pete would not be granted an exemption from the policy to express political messages on his shirts. Tr.32:21-33:15 (R.127-28). Mr. Truitt further testified that the policy did not prohibit students from affixing to their clothing "campaign buttons" or even "bumper stickers" that express political views. App. 4. Counsel for WISD represented that even "pie" sized buttons would be permissible under WISD's interpretation of its policy. Tr.35:23-37:6 (R.130-32); Tr.42:20-22 (R.137).

Counsel for WISD elaborated that the permissibility of buttons and bumper stickers affixed to

clothing would be governed under a provision of the policy providing that "[a]ny aspect of a student's appearance or attire that is likely to distract or disrupt the learning environment, including images or messages that are lewd, vulgar, sexually suggestive, containing profanity, or promoting violation of school rules (such as promoting drug or alcohol use) are prohibited." R.306; Tr.46:10-20 (R.141).

7. The district court denied Pete's motion for a preliminary injunction on the ground that Pete had "not satisfied [his] burden of proving irreparable injury in light of the court's determination that the school district will not prevent Mr. Palmer or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons that do the same." App. 5.

The district court expressed the view that although the merits present "a close question," the school district's prohibition on political speech is "permissible under the cases as I have read them." App. 26-27. Even so, the district court emphasized that "this is an important question that ought to be adjudicated at least by the Circuit" and "[i]f not by the Circuit, then by the Supreme Court." *Id.* at 27.

8. On appeal, the Fifth Circuit affirmed. App. 21. The court of appeals first held that the district court abused its discretion by departing from the well-established rule that where, as here, a plaintiff alleges injury from a regulation that directly limits

speech, the irreparable nature of the harm may be presumed. App. at 5.

Proceeding to the merits, the court of appeals acknowledged that under the general rule established by *Tinker*—i.e., that a school may regulate student speech if "necessary to avoid material and substantial interference with schoolwork or discipline" (*Tinker*, 393 U.S. at 511)—Pete "would prevail" on his free-speech claim given the school district's stipulations that Pete's speech "is not disruptive, lewd, school-sponsored, or drug-related." App. 7-8. But the panel nonetheless ruled for the school district, holding that it was bound by Fifth Circuit precedent permitting the restriction of student speech where school officials have put in place regulations deemed viewpoint and content neutral, see *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001). App. 16-21.

Under that circuit precedent, the panel explained, content-neutral restrictions on student speech are not subject to constitutional review under the *Tinker* framework. App. 12. Rather, they are subject only to the intermediate scrutiny accorded expressive conduct, such as draft-card burning and nude dancing, enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). App. at 8-12. The court of appeals acknowledged that "'although it would be fair * * * to debate whether' intermediate scrutiny should ever apply to student speech, 'that debate already took place' in *Canady*." *Id.* at 9.

The court of appeals next determined that the school district's policy was "content neutral." App. 12-14. The court acknowledged Pete's position that the policy is content-based because, on its face, it allows some categories of speech while prohibiting others—and noted that Pete's position "has some judicial support."[1] *Id.* at 12-13. Nonetheless, the court of appeals held that the policy was content neutral because, in the court of appeals' view, the school district "was in no way attempting to suppress any student's expression* * * *" App. 13-14.

Having thus deemed the policy content neutral, the court of appeals purported to analyze the constitutionality of the "dress code" as a whole under intermediate scrutiny—ignoring that Pete's narrow as-applied constitutional challenge puts at issue only WISD's decision to make exceptions to its prohibition

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[1] The court of appeals deemed the restriction on Pete's political speech content neutral under *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). App. 13. But the Court has also held that "[a]s a general rule, laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 643 (1994) (emphasis added). Thus, "a regulation" like this one "that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends * * * to prohibition of public discussion of an entire topic." *Boos* v. *Barry*, 485 U.S. 312, 319 (1988) (quoting *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)).

on "slogans, words, and symbols" on student clothing for speech that "promotes the school district and its instruction programs," but not for Pete's political speech. App. 14-21; see *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175 n.11 (9th Cir. 2006) ("We need not rule upon the validity of the School's dress code or other * * * policies" where, as here, the student "did not seek to enjoin the enforcement of the School's dress code or any other school policies against any and all students, but sought only to stop the violation of [the student's] purported constitutional right").

The court of appeals concluded its analysis by noting that so long as students in public schools retain some means of expression—such as "outside of school" and "orally at school or through their written work"—intermediate scrutiny's requirement that a government regulation be "no more strict than is essential to achieve its goals" is satisfied. App. 20-21. Under the Fifth Circuit's approach, the prohibition on armbands struck down by the Court in *Tinker* would have survived scrutiny because the students could have worn their armbands after school and at home, and could have expressed their views to the small number of students with whom they conversed during the school day.

REASONS FOR GRANTING THE PETITION

The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Among those constitutional freedoms is the right to engage in political speech, which lies "at the core of what the First Amendment is designed to protect." *Morse* v. *Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)). Because students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, this Court has held that absent evidence of school disruption, the First Amendment requires that students be permitted to express their political views. *Morse*, 127 S. Ct. at 2636-37 (Alito, J., concurring).

In violation of these fundamental constitutional principles, the school district here adopted a policy prohibiting the very speech that the "First Amendment [was] designed to protect" (see *Morse*, 127 S. Ct. at 2626), while allowing speech that "promotes" the school district and its "instructional" mission. The Fifth Circuit furthered an entrenched circuit split by upholding this censorship, consistent with the decisions of the Ninth and Sixth Circuits but in conflict with the Second and Third Circuits. It reached this conclusion notwithstanding the school district's admissions that Pete's silent, passive expression of support for a presidential candidate did not fall into any of the categories of student speech

that this Court has recognized as subject to regulation. Specifically, Pete's attempted communication was "indisputably political in nature," posed "no concrete threat" of "substantial disruption" or "material disturbances" to school activities, "was not communicated as part of a school sponsored activity," was not "offensive" or "sexually explicit, indecent, or lewd," and did "not promote the use of illegal drugs" or any other activity harmful to young people.

The Fifth Circuit's decision not only conflicts with the decisions of other Circuits, but also departs from the traditional principles that have long guided this Court's student-speech jurisprudence. Rather than a problem to be contained or a dangerous activity to be minimized, this Court has held up nondisruptive political speech by students as a transcendent value, one that lies "at the core of what the First Amendment is designed to protect"—even in schools. *Morse*, 127 S. Ct. at 2626 (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986) (noting the "marked distinction between the political 'message' of the armbands in *Tinker*," which upheld "students' right to engage in a nondisruptive, passive expression of a political viewpoint," and "the sexual content" of the speech in *Fraser*).

Our public schools have a responsibility to teach students about constitutional principles not only as part of the curriculum, but also by faithfully applying them. In the context of a presidential election, that

responsibility would seem, if anything, to lead our schools to encourage non-disruptive means of expressing political views—not to stifle them.

To be sure, public school officials have a responsibility to maintain order and discipline so that students can learn. The Court has struck a sensible balance by permitting school officials to curtail the exercise of political speech, but only when it poses a concrete threat to school discipline. Any other rule would foster cynicism and disrespect in our youth, who would perceive on the part of those in authority a hypocritical failure to respect and defend the values upon which our Nation was founded. This case is an ideal vehicle for re-affirming those principles, resolving the conflict among the Circuits about the proper application of *Tinker*, and bringing badly needed clarity to an important area of the law—one that daily impacts millions of students, their teachers, and school administrators.

The petition should be granted because the Fifth Circuit has decided an important, recurring issue of constitutional law in a manner contrary to that of other Circuits. It should be granted because the Fifth Circuit's decision is in conflict with the decisions of this Court. And it should be granted because the Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, cannot be limited in any principled fashion to expressive conduct or even to schools—thereby enlarging government's ability to censor the

exercise of core First Amendment freedoms in a wide variety of contexts.

I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHETHER *TINKER* APPLIES TO CONTENT-NEUTRAL REGULATIONS OF STUDENT SPEECH

This Court set out the framework for student free-speech claims in *Tinker* v. *Des Moines Independent Community School District*, *supra*. In *Tinker*, students decided to wear black armbands to school to express their opposition to the Vietnam War. In response to the planned protest, school officials prohibited the wearing of all armbands and provided that any students wearing armbands would be suspended from school until they returned without them. The Court held that the students could not be disciplined under the school policy, explaining that the wearing of armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. The Court explained that a student "may express his opinions * * * if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The Court took care to acknowledge "the special characteristics of the school environment," *id.* at 506,

by making clear that school officials could prohibit student speech if that speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. Recognizing that school officials have comprehensive authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools, the Court held that absent a showing by the school "that engaging in the forbidden conduct would materially and substantially interfere" with school discipline, school policies that place restrictions on a student's freedom of speech cannot be sustained. *Ibid.* (internal quotations and citations omitted). The Court explained that "in our system" students "may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. Thus, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Ibid.*

The Court re-affirmed *Tinker* and further delineated the scope of *Tinker*'s general rule in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court upheld disciplinary action against a student who gave a speech at a high school assembly that was laced with "pervasive sexual innuendo." *Id.* at 677-79. The Court held the school's actions permissible because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" among students. *Id.* at 683. School policies thus can

prohibit student speech if it is "vulgar," "lewd," "indecent," or "plainly offensive." *Id.* at 683-85.

The Court next affirmed *Tinker* as the general standard and addressed student-speech rights in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), permitting a high school principal to censor articles in a school-sponsored newspaper. While the Court upheld the principal's deletion of the articles from the student newspaper, it limited the reach of its holding to school-sponsored speech. As the Court put it, "whether the First Amendment requires a school to *tolerate* particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech." *Id.* at 270-71 (emphasis added). Under *Hazelwood*, school officials may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

In its most recent student-speech case, the Court held that school officials may permissibly restrict student speech that could be "reasonably viewed as promoting illegal drug use." *Morse* v. *Frederick*, *supra*, at 2625. The speech at issue in *Morse* was a large banner reading "Bong Hits 4 Jesus" unfurled by students at a school-supervised event. *Id.* at 2622. Noting that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest,"

the majority concluded that the "First Amendment does not require schools to tolerate at school events student expression that contributes to" the dangers posed by illegal drugs. *Id.* at 2628-29. In reaching its holding, the Court expressly declined to prohibit student speech promoting illegal drug use on grounds that such speech was "offensive," noting that "much political and religious speech might be perceived as offensive to some." *Id.* at 2629.

In *Morse*, the Court re-affirmed *Tinker* and described it as holding—without limitation or qualification—that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 2626. The Court focused on the "essential facts" that the students in *Tinker* "sought to engage in political speech, using the armbands to express their 'disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.'" *Id.* at 2626 (quoting *Tinker*, 393 U.S. at 514).

In a concurring opinion, Justice Alito, joined by Justice Kennedy, agreed that "public schools may ban speech advocating illegal drug use." *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). But Justice Alito "join[ed] the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction

of speech that can plausibly be interpreted as commenting on any political or social issue * * * * *" *Id.* at 2636.

The majority opinion, Justice Alito stressed, "correctly reaffirms the recognition in [*Tinker*] of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2636-37 (Alito, J., concurring). Justice Alito acknowledged that "*Tinker*, which permits the regulation of student speech that threatens a concrete and 'substantial disruption,' [*Tinker*, 393 U.S.] at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id.* at 2637. "But," Justice Alito emphasized, "I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court." *Ibid.* Justice Alito thus joined the majority opinion "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Ibid.*

Over the last 40 years, then, the Court has carved out a few narrow categories of speech that a school may restrict even without the threat of substantial disruption, while at the same time reaffirming the general rule set forth in *Tinker* that "[i]n the absence of a specific showing of *constitutionally valid reasons* to regulate their speech, students are entitled to freedom of expression of their

views." *Tinker*, 393 U.S. at 511 (emphasis added). But, as numerous courts have noted, there is conflict and confusion in the lower courts about what counts as a "constitutionally valid reason" for regulating student speech. See, e.g., *Guiles* v. *Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (Cardamone, Sotomayor, Pooler, JJ.), *cert. denied sub nom. Marineau* v. *Guiles*, 127 S. Ct. 3054 (2007) ("It is not entirely clear whether *Tinker*'s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination."); *Bar-Navon* v. *Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007) ("Courts at all levels have demonstrated confusion as to the scope of *Tinker*'s holding * * * * Courts disagree * * * as to the broader question of whether the legal standard in *Tinker* is applicable more generally to all regulation of student speech and not simply speech that expresses a particularized view.").

Specifically, courts are split on whether the *Tinker* framework extends to content-neutral and viewpoint-neutral regulations. The Ninth Circuit has taken the position that "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny." *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008). Similarly, the Sixth Circuit holds that "[w]hile *Tinker* requires schools to demonstrate a 'material

and substantial interference' with the educational process in order constitutionally to silence a student on the basis of the student's particular viewpoint," a school district "need not satisfy this demanding standard merely to impose a viewpoint-neutral regulation" of student speech. *M.A.L.* v. *Kinsland*, 543 F.3d 841, 850 (6th Cir. 2008); *accord Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391-93 (6th Cir. 2005).

In sharp conflict, the Third Circuit holds that *all* student speech "falling outside" of the narrow categories of speech recognized by this Court "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). The Second Circuit has held likewise, while acknowledging the "lack of clarity" on the issue. *Guiles* v. *Marineau*, *supra*, at 326 ("*Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar").

Indeed, those courts have vindicated student-speech rights under circumstances far less constitutionally compelling than those presented here, which involve quintessentially political, admittedly inoffensive, and indisputably non-disruptive speech. In *Guiles* v. *Marineau*, for example, a middle-school student wore a shirt emblazoned with words and images denigrating then-President George W. Bush by, among other things, referring to him as "Chicken-Hawk-in-Chief" and including images of cocaine, a

martini glass, dollar signs, and oil rigs. *Id.* at 322. School officials decided that the shirt violated the school's dress code. *Ibid.* The Second Circuit, however, decided that the school had violated the student's free-speech rights. *Id.* at 331.

Concluding that the images of drugs and alcohol were not offensive because they were anti-drug and combined with a political message, the Second Circuit rejected the applicability of *Fraser*, noting "the absence of any political message in Fraser's speech." *Id.* at 330. Because the speech was not school-sponsored, *Hazelwood* did not apply. *Id.* at 327. Instead, the longstanding *Tinker* rule applied. *Id.* at 330. Because the speech caused no disruption, the Second Circuit held that the school violated the student's speech rights in censoring that speech. *Id.* at 331; see also *Newsom* v. *Albermarle County Sch. Bd.*, 354 F.3d 249, 252, 259 (4th Cir. 2003) (holding that middle-school principal's ban on a student's pro-National Rifle Association shirt that "depicted three black silhouettes of men holding firearms" was impermissible because there was no evidence that the NRA shirt "ever substantially disrupted school operations or interfered with the rights of others").

Similarly, the Seventh Circuit, in *Nuxoll* v. *Indian Prairie School District*, 523 F.3d 668 (7th Cir. 2008), reversed the denial of a preliminary injunction and compelled the school district to allow a high school student to wear a shirt in school bearing the legend "Be Happy, Not Gay." The school had prohibited the student from wearing the shirt as a

violation of its policy prohibiting "derogatory comments, oral or written, that refer to race, ethnicity, religion, gender, sexual orientation, or disability." In an opinion authored by Judge Posner, the Seventh Circuit concluded that the school's restriction on student speech could not be justified as a foreseeable "substantial disruption" under *Tinker*. A federal district court in Florida reached a similar conclusion regarding pro-gay symbols such as rainbows and pink triangles. *Gillman* v. *Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

Those decisions are difficult to square with the Fifth Circuit's in this case. If the First Amendment requires school districts in the Second Circuit to allow non-disruptive student speech on clothing expressing disapproval of a sitting president, then it is difficult to understand how the First Amendment can permit school districts in the Fifth Circuit to censor non-disruptive student speech expressing support for a presidential candidate when the Fifth Circuit has concluded that the speech is not disruptive.

To be sure, speech that cannot be proscribed constitutionally by school officials in one circumstance may nonetheless be prohibited in another—but that distinction turns on the speech's potential for *disruption*, which indisputably is not present here. See, e.g., *Barr* v. *Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (pet. filed, April 22, 2009) (holding that ban on wearing or displaying the Confederate flag was justified under *Tinker* because the ban was "necessary to avoid material and substantial interference with

schoolwork or discipline") (quoting *Tinker*, 393 U.S. at 511).

The Fifth Circuit has further entrenched the split by expressly holding, in agreement with the Ninth and Sixth Circuits (but in conflict with the Second and Third), that the *Tinker* framework does not apply when restrictions on pure student speech are content- and viewpoint-neutral. The conflict is mature, significant, and irreconcilable. Further percolation will not assist the Court in resolving it. The Court's review is needed now to settle the important legal issues at stake and provide clarity about the scope of student-speech rights for students, parents, and school officials alike.

This case squarely presents the issue on which the lower courts have divided almost evenly, thereby presenting the Court with a much-needed opportunity to resolve the conflict illuminated but not settled by *Morse* (and to eliminate confusion on the part of school boards, administrators, teachers, and students). It also implicates precisely the concerns expressed by Justices Alito and Kennedy in their concurring opinion in *Morse* about unnecessarily broad restrictions on student speech.

As their concurring opinion explains, "public schools are invaluable and beneficent institutions, but they are, after all, organs of the State." *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). In particular, the concurring opinion cautioned about the

notion that "educational mission" is a panacea allowing for virtually unlimited curtailment of student speech:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Ibid. (Alito, J., concurring). The school district has explicitly taken the position that it may allow speech that "promotes" its educational mission while prohibiting speech that, in the school district's view, does not—precisely the sort of restriction singled out by the concurring opinion as raising particular concern. See *ibid.*; see also *Harper*, 445 F.3d at 1196 n.7 (Kozinski, J., dissenting) (admonishing that "one man's civic responsibility is another man's thought control").

This case is an ideal vehicle for resolving the conflict among the lower courts, clarifying the constitutional limits on student-speech restrictions, and re-affirming the long-recognized role of public schools in educating youth for responsible citizenship—a vital mission that cannot be achieved without "scrupulous protection of Constitutional freedoms of

the individual." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943); see also *Hodgkins ex rel. Hodgkins* v. *Peterson*, 355 F.3d 1048 (7th Cir. 2004) (Rovner, J.) ("We not only permit but expect youths to exercise those liberties—to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view—so that they might attain the right to vote at age eighteen with the tools to exercise that right."). The Fifth Circuit expressly acknowledged that its treatment of the issue was outcome-determinative, given the school district's stipulations that Pete's political speech was not disruptive. Nothing will be gained by waiting for another case to present similar issues. This case is an optimal vehicle for resolving an important, recurring issue of constitutional law that affects students, parents, and school officials across the Nation.

II. THE APPLICATION OF *O'BRIEN* IN THE DECISION BELOW SHARPLY DEPARTS FROM LONG-ACCEPTED FIRST AMENDMENT PRINCIPLES

The Fifth Circuit's determination that intermediate scrutiny can properly be applied to restrictions on pure student speech should, as explained above, be reviewed (and ultimately reversed) by this Court. Even if intermediate scrutiny could be applied in this context, however, the Fifth Circuit's understanding of that standard in this case—which, despite purporting to be intermediate scrutiny, effectively operates as rational basis review, if that—is in direct

conflict with this Court's cases establishing the standards applicable to regulations governed by intermediate scrutiny. The Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, would vest government-run schools with virtually unfettered authority to censor speech.

What is more, there is no principled basis for limiting the Fifth Circuit's analysis to the context of student speech. Because the Fifth Circuit's application of intermediate scrutiny is not only erroneous, but also sets a dangerous example for other courts to follow, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on the proper application of intermediate scrutiny in the public school setting, particularly if it is to be applied to all "content neutral" restrictions on pure speech, such as the written word, and not merely expressive conduct.

It is settled law that under intermediate scrutiny, the government bears the burden of demonstrating that a speech regulation (1) must be "within the constitutional power of the Government;" (2) must "further[ ] an important or substantial governmental interest;" (3) "the governmental interest" must be "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. As applied by the Fifth Circuit in this case,

however, that scrutiny was effectively diluted to mere rational-basis review, at most.

First, the court of appeals impermissibly supplied hypothetical justifications for the school district's censorship that not even the school district advanced. See App. 15-18; see also *Annex Books, Inc.* v. *City of Indianapolis*, ___ F.3d ___, No. 05-1926, 2009 WL 2855813, at *3 (7th Cir. Sept. 3, 2009) (Easterbrook, J.) (distinguishing intermediate scrutiny from the "rational-relation test," under which "all a court need do is ask whether a sound justification of a law may be imagined"). For example, the court of appeals hypothesized—without addressing the school district's actual interpretation of its policy as permitting political messages when on bumper stickers stuck on shirts, but prohibiting political messages when printed on shirts—that the school's interest in "promoting professional and responsible dress" still "functions" because "students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not." App. 18.

The court of appeals did not explain how a policy that, by the school district's own admission, would permit an unlimited number of bumper stickers and buttons of all sizes and shapes—even "pie"-sized buttons—to be stuck on student clothing, while prohibiting political writing printed on student clothing, actually *furthers*, as intermediate scrutiny requires, *any* governmental interest, much less one in promoting "professional and responsible dress." Nor

did the court of appeals explain how a policy that allows messages on t-shirts supporting the school's football team or cheerleading squad, while prohibiting messages on t-shirts expressing support for presidential candidates or the text of the First Amendment, furthers any such interest. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972) (striking down ordinance banning all picketing except for labor picketing outside public schools and explaining that "[i]f peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful" even under *O'Brien*'s intermediate scrutiny standard).

The court of appeals did not even attempt to scrutinize the speech restriction actually challenged by Pete: WISD's policy of making exceptions to its ban on "slogans, words, and symbols" deemed by school officials to promote the school district and its instructional mission, such as messages supporting curricular clubs, athletic teams, and school "spirit," but refusing to make similar exceptions for Pete's undisruptive, core political speech—in short, why a policy banning some words and allowing others approved by the government is content neutral.[2]

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[2] The restriction on speech unanimously struck down by the Court in *Board of Airport Commissioners of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), was by any measure far more neutral than the regulation upheld here. The regulation in *Jews for Jesus* even-handedly banned all "First Amendment activities by any individual and/or entity." *Id.* at 570-71. That

(Continued on following page)

Such deference to government, even in the school setting, is wholly incompatible with intermediate scrutiny, properly applied. See, e.g., *Hodgkins*, 355 F.3d at 1048 (holding that youth curfew policy could not survive intermediate scrutiny in First Amendment challenge because it was not sufficiently narrowly tailored to further the government's important and substantial interests).

Similarly inappropriate was the court of appeals' demand that *Pete* "show that the button allowance *destroys* all of the District's stated important governmental interests." App. 18. The court of appeals' analysis is exactly backwards: Under intermediate scrutiny, it is the *government*'s burden to show that the restriction *furthers* its interests. The Fifth Circuit did not appear even to consider whether, as intermediate scrutiny requires, the government had shown its restriction on Pete's political speech was no greater than necessary to further the government's stated interests. Instead, it asked a very different question: Whether those stated interests still "function" in light of the differential treatment accorded Pete's political speech under the policy. See *ibid.* That is not the test under intermediate scrutiny, because the First Amendment requires more. See *Int'l*

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ban was impermissible, this Court explained, in part because "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—* * * is still protected speech even in a nonpublic forum." *Id.* at 576 (citing *Cohen* v. *California*, 403 U.S. 15 (1971)).

Soc'y for Krishna Consciousness v. *Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) (warning against "convert[ing] what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat").

The Fifth Circuit's dilution of intermediate scrutiny in the course of upholding the school district's censorship of Pete's political speech would be troubling enough were it limited to the school context, or to "dress codes," or to expressive conduct. But it is not. And there is no principled basis for doing so. This Court's intervention is therefore needed not only to clarify the permissible grounds upon which student speech in government-run schools may be restricted, but also to ensure that the Fifth Circuit's erroneous application of intermediate scrutiny in this case does not extend the reach of government's ability to regulate protected speech into other contexts to which intermediate scrutiny applies, as well.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-10903

PAUL T. PALMER, by and Through His Parents and Legal Guardians, Paul D. Palmer and Dr. Susan Gonzalez Barker,

Plaintiff-Appellant,

versus

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Aug. 13, 2009)

Before HIGGINBOTHAM, SMITH and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Paul Palmer, a student at Waxahachie High School, submitted three shirts for approval under the dress code of Waxahachie Independent School District ("the District"), whose administration told Palmer the shirts violated the code and could not be worn to school. Palmer sued and requested a preliminary

injunction, which the district court denied. He appeals, and we affirm.

I.

On September 21, 2007, Palmer, then a sophomore, went to school wearing a shirt with "San Diego" written on it. Assistant Principal Johnson told Palmer his shirt violated the District's dress code,[1] which did not allow t-shirts with printed messages. Palmer called his parents, who brought him a "John Edwards for President '08" t-shirt to wear instead. Johnson said Palmer would not be allowed to wear that shirt either, because it contained a printed message. Palmer appealed the decision to Principal David Nix, who denied the appeal, and that denial was sustained by the District's Superintendent, Thomas Collins.

On April 1, 2008, Palmer sued the District under 42 U.S.C. § 1983, alleging that the dress code violated his freedom of speech under the First Amendment. He asked for declaratory relief under 28 U.S.C. § 2201, a preliminary injunction, a permanent injunction, nominal damages, and attorneys' fees. The District answered that Palmer's shirt violated the dress code even though it did not pose a concrete threat of

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[1] This version of the dress code did not allow students to wear messages on t-shirts unless they were in connection with a club, sports team, university, or school spirit. It allowed students to wear polo shirts with messages.

substantial disruption, was not sexually explicit, was not school-sponsored speech, and did not promote illegal drug use.

The district court held a hearing on May 8 on Palmer's motion for preliminary injunction. District Assistant Superintendent David Truitt testified that, four days before the hearing, the District had adopted a new dress code for the upcoming school year. Because of the new code, the court dismissed Palmer's motion without prejudice but asked the District for a copy of the new code.

On May 19, the District submitted its new dress code, which restricted more speech, including polo shirts with messages, shirts with professional sports team logos, and clothing with university messages. The policy continued to permit "campus principal-approved [District] sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts or t-shirts." It also allowed logos smaller than two inches by two inches.[2]

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[2] The District claimed that it adopted the stricter dress code to meet several problems. First, it had found that teachers and administrators spent too much time enforcing the old code, and the District believed the new one would be easier to enforce. Second, it banned professional sports shirts and university shirts because students had worn them to promote gang affiliation. Third, it found that neighboring school districts had used similar dress codes that had been successful. Finally, the District noted that it had considered adopting school uniforms but decided not to do so, because it still wanted students to have some freedom to chose [sic] their clothing.

After receiving the dress code, Palmer submitted three shirts to the District for approval. One was the original John Edwards for President t-shirt, one was a John Edwards for President polo shirt, and one was a t-shirt with "Freedom of Speech" on the front and the text of the First Amendment on the back. The District rejected all three.

Palmer again sued, and Truitt again testified, admitting that the dress code did not ban political pins, buttons, bumper stickers, or wrist bands and stating that those would be analyzed under the District's policy of not allowing any item that is distracting, sexually explicit, or promoted a violation of school rules. The district court determined that Palmer had not shown that he would suffer irreparable harm because of the dress code and denied a preliminary injunction.

II.

We review the denial of a preliminary injunction for abuse of discretion. *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993). We evaluate *de novo* the legal principles on which the decision is grounded. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (citation omitted). A district court should issue a preliminary injunction only if the plaintiff establishes

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that

> the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009) (citing *Speaks v. Kruse,* 445 F.3d 396, 399-400 (5th Cir. 2006)). The district court examined only the second prong and concluded that Palmer did not "satisf[y his] burden of proving irreparable injury in light of the Court's determination that the school district will not [prevent Palmer] or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons to do the same."

The "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Because "[w]ords printed on clothing qualify as pure speech and are protected under the First Amendment," the dress code's ban on his shirts would cause Palmer irreparable injury. *Canady v. Bossier Parish Sch. Bd.,* 240 F.3d 437, 440 (5th Cir. 2001) (citations omitted). The analysis is no different just because the code permits buttons and stickers. Therefore, the district court abused its discretion in deciding that the District's enforcement of the dress code could not irreparably harm Palmer.

III.

A.

Both parties ask that we examine the first prong, whether there is "a substantial likelihood of success on the merits." We may do so, because "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." *United States v. Dunigan,* 555 F.3d 501, 508 n.12 (5th Cir.) (citation omitted), *cert. denied,* 129 S. Ct. 2450 (2009).

B.

Although students in public schools have First Amendment rights, this "constitutional protection is not absolute." *Canady,* 240 F.3d at 441. "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick,* 127 S. Ct. 2618, 2621 (2007) (citation omitted).

The Supreme Court has issued four major opinions on public school regulation of student speech. First, in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), a public school punished students who wore black armbands to school to protest the Vietnam War. *Id.* at 504. The Court confirmed that "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.* at 506, and "[i]n the absence of a specific showing of constitutionally valid

reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. Schools can restrict student speech only if it materially interferes with or disrupts the school's operation, *id.* at 512, and cannot "suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* at 511 (citing *Burnside v. Byars,* 363 F.3d 744, 749 (5th Cir. 1966)).

Since *Tinker,* every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate. In *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 687 (1986), the Court ruled that schools can prohibit "sexually explicit, indecent, or lewd speech." The Court held in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 271-73 (1988), that schools can also regulate school-sponsored speech. Finally, in *Morse v. Frederick,* 127 S. Ct. 2618 (2007), the Court determined that schools can prohibit "[s]peech advocating illegal drug use." *Id.* at 2638 (Alito, J., concurring).

Palmer argues that under these decision, he wins on the merits. Reading *Tinker, Fraser, Hazelwood,* and *Morse* together, Palmer believes the Court has established a bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related. If this were the rule, Palmer indeed would prevail, because the District has stipulated that his shirts do not fall into any of these categories. Palmer's proposed categorical rule, however, is flawed, because it fails to include another type

of student speech restriction that schools can institute: content-neutral regulations.

In *Canady,* the plaintiff presented this court with the same categorical argument that Palmer makes, in a facial challenge to a school uniform code. The plaintiff argued that uniforms violated the First Amendment because they banned student clothing that was not disruptive, lewd, or school-sponsored. Judge Parker, writing for the court, recognized that the Supreme Court had established these categories for situations in which schools were targeting specific speech but that content-neutral regulations "do not readily conform to [any] of the three categories addressed by the Supreme Court." *Canady,* 240 F.3d at 442. These cases all addressed "disciplinary action by school officials directed at the political content of student expression," not content-neutral regulations such as school uniforms. *Id.* at 442-43.

Because the regulation was content-neutral, we held that it should be analyzed under the rules of "the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct." *Id.* at 443; *see United States v. O'Brien,* 391 U.S. 367 (1968). "Thus, the School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." *Id.* (citation omitted). This court concluded that viewpoint- and content-neutral school dress

codes should be reviewed under intermediate scrutiny.[3]

Palmer and *amici* vigorously argue that intermediate scrutiny should not apply to student speech, because the Supreme Court has never used that standard when reviewing such cases. The American Center for Law and Justice, as *amicus,* notes that *O'Brien* predates *Tinker,* and thus the Court implicitly rejected intermediate scrutiny for student speech cases when it declined to use it in *Tinker.* These arguments, however, overlook our rule of orderliness, which "forbids one of our panels from overruling a prior panel."[4] "Although it would be fair . . . to debate whether" intermediate scrutiny should ever apply to student speech, "that debate already took place"[5] in *Canady,* so we follow that decision. In addition, *Canady* has been followed by three other circuits[6] and

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[3] For the remainder of this opinion, we use "intermediate scrutiny" to refer to the time, place, manner, or *O'Brien,* tests referred to in *Canady.*

[4] *Pretus v. Diamond Offshore Drilling, Inc.,* 571 F.3d 478, 487 (5th Cir. 2009) (Smith, J., dissenting) (quoting *Teague v. City of Flower Mound, Tex.,* 179 F.3d 377, 383 (5th Cir. 1999)).

[5] *Id.* at 488 (Smith, J., dissenting).

[6] *See Bar-Navon v. Brevard County Sch. Bd.,* 290 F. App'x 273, 276-77 (11th Cir. 2008); *Jacobs v. Clark County Sch. Dist.,* 526 F.3d 419, 428-32 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 390-93 (6th Cir. 2005).

has effectively become the national standard for analyzing content-neutral student speech.[7]

Palmer presents several arguments for why *Canady,* despite being our controlling precedent, should not apply in this case. First, he claims that Justice Alito's concurrence in *Morse* overruled *Canady.*[8] *Morse,* however, involved a school's targeting specific speech and did not concern content-neutral regulations. That distinction is critical and controlling. In addition, Justice Alito never mentioned *Canady* or any similar case and in fact recognized that *Tinker* "does not set out the only ground on which in-school student speech may be regulated." *Morse,* 127 S. Ct. at 2637 (Alito, J., concurring). Nothing in Justice Alito's concurrence or the majority opinion in *Morse* overruled *Canady.*[9]

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[7] Amicus Walter Bateman's request that we follow Judge Thomas's dissent in *Jacobs*—which suggests that "the Supreme Court has consistently focused on the *nature of the speech itself,*" rather than the regulation—runs afoul of *Canady. See Jacobs,* 526 F.3d at 442-43 (Thomas, J., dissenting). That argument, moreover, does not properly distinguish between regulations that suppress specific speech and content-neutral regulations. In cases reviewing content-neutral time, place, manner restrictions, the Supreme Court has examined the regulations, not the speech being regulated. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791-803 (1989).

[8] In *Ponce v. Socorro Independent School District,* 508 F.3d 765, 768 (5th Cir. 2007), we recognized that Justice Alito's concurrence is "controlling" for our interpretations of *Morse.*

[9] Palmer's argument that our decision in *Ponce* overruled *Canady* is similarly incorrect. That case interpreted *Morse* and

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Next, Palmer posits that *Canady* does not govern our case, because it examined a uniform code rather than a dress code. This is a distinction without a difference, because a uniform code is merely a strict version of a dress code.

Palmer's distinction would require that federal judges decide when a dress code is strict enough to be considered a uniform and would spawn endless line-drawing litigation. In addition, it would punish those school districts that adopt dress codes rather than uniforms because their students cannot afford uniforms. Also, such a rule would have the perverse result of pushing schools to adopt uniforms rather than dress codes that give students some clothing choice.

Palmer also argues that this case differs from *Canady* because it is an as-applied, rather than facial, challenge to the dress code. This fact does not change our standard of review. When analyzing time, place, and manner restrictions, we have used intermediate scrutiny for as-applied challenges, not just facial challenges.[10] The reason is obvious—to review facial challenges for a dress code under intermediate scrutiny while reviewing as-applied challenges for strict scrutiny would make no sense and would

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examined a school's suppression of dangerous speech, not content-neutral regulations.

[10] *See, e.g., United States v. Hicks*, 980 F.2d 963, 970-71 (5th Cir. 1992) (analyzing as-applied challenge to statute under intermediate scrutiny).

effectively destroy any content-neutral regulation that could possibly ban political speech. Challenges to content-neutral dress codes, whether facial or as-applied, are reviewed under intermediate scrutiny.

In summary, because *Canady* survives *Morse* and applies to all content-neutral challenges, school regulation of student speech can be justified on five—not just four—grounds. If the speech is disruptive (*Tinker*), lewd (*Fraser*), school-sponsored (*Hazelwood*), or promoting drug use (*Morse*), schools may in some instances restrict specific student speech. Student speech can also be regulated so long as the regulation is viewpoint- and content-neutral (*Canady*).

C.

We must decide whether the District's dress code is content-neutral. The District does not allow messages on shirts, but it exempts small logos on shirts and "campus principal approved" shirts that promote school clubs, organizations, athletic teams, or "school spirit." Palmer argues that the dress code's exemption for small logos and school-sponsored shirts by definition violates content-neutrality, because it distinguishes based on content. Similar allegedly-content-based dress code exceptions have been examined by

three other federal courts and found to be content-neutral.[11]

Palmer's argument regarding content-neutrality has some judicial support. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994) (citations omitted). A dress code "is content based if . . . it differentiates based on the content of the speech on its face." *Jacobs*, 526 F.3d at 444 (Thomas, J., dissenting).

The District's code, however, is content-neutral. In its preeminent case on content-neutral regulation, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court stated that "[t]he principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." The Court has reiterated this

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[11] *See Jacobs*, 526 F.3d at 432-33; *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 719 (E.D. Ark. 2007), *aff'd*, 540 F.3d 752 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1526 (2009); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 625 n.5 (W.D. Ky. 2000), *aff'd*, 21 F. App'x 252 (6th Cir. 2001). *But cf. Blau*, 401 F.3d at 391 (noting that appellant did not argue content-neutrality of dress code that allowed for "any logos larger than the size of a quarter save for Highlands logos or other 'Highlands Spirit Wear' ").

principle.[12] "[A] regulation is generally 'content-neutral' if its restrictions on speech are not based on disagreement with the message it conveys." *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 326-27 (5th Cir. 2005) (citations and footnote omitted).

The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral. Its allowance for school logos and school-sponsored shirts does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages. We therefore employ intermediate scrutiny.

D.

Under intermediate scrutiny, "the School Board's uniform policy will pass constitutional scrutiny [1] if it furthers an important or substantial government interest; [2] if the interest is unrelated to the suppression of student expression; and [3] if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."

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[12] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 719 (2000) (reaffirming *Ward*); *Turner*, 512 U.S. at 641 (stating that the First Amendment is concerned with "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas").

Canady, 240 F.3d at 443.[13] Palmer does not contend that the dress code violates the second prong but argues only on the first and third prongs.

Palmer asserts that the code does not further an important or substantial governmental interest. The code's preamble states that the code was adopted "to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students." The District notes that the code would reduce administrative time spent enforcing the code and promote the school and its activities.

"Improving the educational process is undoubtedly an important interest." *Canady,* 240 F.3d at 443 (citation omitted). Improving student test scores and reducing disciplinary infractions qualify as important governmental interests. *Id.* Improving student performance, instilling self-confidence, increasing attendance, decreasing disciplinary referrals, and lowering the drop-out rate are all important governmental interests that meet the first prong's requirement. *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 286 (5th Cir. 2001) (citations omitted). Importantly, this list of recognized interests is not exhaustive, and

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[13] The *O'Brien* test also requires that the government have the power to enact a given regulation, but in all dress codes cases this prong is, of course, automatically met. *See Jacobs,* 526 F.3d at 434 n.33.

federal courts should give substantial deference to schools where they present their reasons for passing a given dress code.[14]

Under our precedents, the District's stated interests all qualify under the first prong. The stated benefits for the students, such as providing a safer and orderly learning environment and encouraging professional dress, are all sufficient interests. "[I]t is hard to think of a governmental interest more important than the interest in fostering conducive learning environments for our nation's children." *Jacobs*, 526 F.3d at 435-36. The benefits for the school, such as reducing time spent enforcing the code and promoting school spirit, are also important in promoting better education. The District and its administrators—not federal judges—are in a better position to formulate a dress code, and we are understandably hesitant to question their stated justifications. *See Canady*, 240 F.3d at 444.

The District has provided more than enough evidence to establish its important governmental

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[14] *See Hazelwood*, 484 U.S. at 267 ("'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal courts." (citing *Fraser*, 478 U.S. at 683); *Littlefield*, 268 F.3d at 287 ("[F]ederal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools." (citations omitted); *Canady*, 240 F.3d at 444 ("[I]t is not the job of federal courts to determine the most effective way to educate our nation's youth.").

interests. In *Canady* and *Littlefield,* this court properly set a low bar for the evidence a district must submit to show its dress code meets its stated goals. A statistical showing that the code has improved test scores or lowered disciplinary actions is sufficient. *Id.* at 443-44. Additionally, evidence of improvements in other districts that have adopted the same or a similar dress code can support the district's decision. *Littlefield,* 268 F.3d at 286 n.16.

We do not, however, require statistical or scientific evidence to uphold a dress code; improvements in discipline or morale cannot always be quantified. The sworn testimony of teachers or administrators would also suffice. Again, they are in a better position than are we to determine the benefits of the dress code. Here, Assistant Superintendent Truitt testified that the school board had examined over forty other dress codes to see which would be the best fit for the District; the board took trips to see dress code enforcement in action and reviewed data regarding the impact of codes on other schools. This is more than enough to show that the District justified its important governmental interest with factual support.

Palmer does not take issue with the school board's claimed interests but instead argues that these interests do not apply, because the board's ban on shirts is undermined by allowing students to wear pins, buttons, wrist-bands, and bumper stickers containing messages. Generally, Palmer believes that allowing messages on buttons destroys the benefit of the dress code and its banning of messages on

shirts.[15] For Palmer's objection to stand, however, he would have to show that the District's button allowance destroys all of the District's stated important governmental interests; if any of those stated benefits remain, then the dress code—button/shirt distinction and all—is valid.

The District's stated benefits function under this distinction. Because shirts are large and quite visible, banning them while allowing buttons would still cause less distraction and promote an orderly learning environment. Buttons and pins are also less prominent than are shirts and therefore require less attention from and regulation by teachers. Another District goal—promoting professional and responsible dress—still functions as well, because students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not.

Most importantly, even if, *arguendo,* we were to find the distinction between messages on shirts and messages on buttons odd, we recognize that the teachers and administrators who establish these rules know better than do we how the distinction will

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[15] The court in *Jacobs,* 526 F.3d at 435, held that for the first prong of intermediate scrutiny, the court must take the government's stated interests at face value and cannot analyze the plaintiff's challenges to those interests. Because this position has no basis in law, we disagree with it and analyze Palmer's allegations that the dress code does not actually support the District's purported interests.

function in schools. "[F]ederal courts should defer to school boards to decide . . . what constitutes appropriate behavior and dress in public school." *Littlefield*, 268 F.3d at 287. The determination of where to draw lines on dress code decisions "properly rests with the school board, rather than with the federal courts." *Hazelwood*, 484 U.S. at 266 (citation, brackets, and internal quotation marks omitted).

Finally, we reject Palmer's "somewhat ironic[]" argument that the dress code "is an unconstitutional abridgment of speech because it does not abridge enough speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 540 (1981) (Stevens, J., dissenting in part). Under the current dress code, Palmer can come to school with a "John Edwards for President" button or First Amendment wrist-band and express his views through these devices. But Palmer requests that we strike down the dress code *because* the District gave him this avenue to express himself. He argues that, to survive intermediate scrutiny, the code must allow him no options at all.

We decline to follow this perverse reasoning. Under Palmer's rule, school districts would rush to impose the strictest dress codes possible or merely require school uniforms. Students such as Palmer would never be able to express their views through

any medium. We eschew any legal principle that would lead to such a race-to-the-bottom.[16]

Also, because we review dress codes for intermediate scrutiny, such a rule would be particularly unreasonable. Under the third prong of intermediate scrutiny, the District must show that its dress code is no more strict than necessary to achieve its goals. In *Canady,* 240 F.3d at 443, we expressly noted that allowing speech through "other mediums during the school day" ensured that a dress code did not violate this third prong. Yet, under Palmer's argument, if a school allowed certain other speech mediums, in order to survive scrutiny under the third prong, that allowance could cause the entire code to fail under the first prong. We decline the invitation to impose such a Catch-22 on school districts.

Lastly, Palmer argues that the dress code fails under the third prong, which requires that "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Turner,* 512 U.S. at 662. In *Canady,* however, we noted that a dress code

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[16] There are certain situations in which allowing more speech can cause a regulation to violate the First Amendment. Indeed, were the District's additional permitted speech specific to one particular viewpoint—say a rule that only allowed pro-abortion buttons—this could run afoul of the First Amendment. Our situation, however, is different: The District is not providing a right for student speech on a given topic, but instead is providing students a limited means to express their views on any topic.

passes this third prong so long as students "remain free to wear what they want after school hours" and "may still express their views through other mediums during the school day." *Canady,* 240 F.3d at 443. In addition, in *Littlefield,* 268 F.3d at 287, this court said that a dress code whose restrictions "pertain only to student attire during school hours and do not affect other means of communication" does not run afoul of the third prong. Thus, under our precedent, so long as a dress code does not restrict student dress outside of school and provides them with some means[17] to communicate their speech during school, it passes the third prong. The District's code fits easily within this rule, so it passes intermediate scrutiny.

In summary, Palmer has not shown a likelihood of success. There is no abuse of discretion, and the order denying a preliminary injunction is AFFIRMED.

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[17] The means do not necessarily have to be related to messages on clothing or buttons. Instead, schools can allow students to communicate their messages through other avenues, such as orally at school or through their written work.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAUL T. PALMER, by and through his parents and legal guardians, Plaintiff, VERSUS WAXAHACHIE INDEPENDENT SCHOOL DISTRICT, Defendant.	(CIVIL ACTION (NUMBER (3:08-CV-0558-m ((((August 15, 2008 (9:00 a.m. (

TRANSCRIPT OF SECOND MOTION
FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE

(Filed Aug. 21, 2009)

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[68] THE COURT: Well, I have to say I'm disappointed about where we are. I think this is a legitimate issue of constitutional magnitude, whether a student can wear a T-shirt or a pin or a button or a bumper sticker that conveys a political message in the context of a school dress code or uniform policy. That is a legitimate question that should be determined by a higher court than me ultimately.

I sensed – and I didn't intend it to be a gotcha when we were here the last time. The air sort of went out of the room over here on the right side, because these cases come along rarely, and there they were, all young energetic lawyers all teed up to take a trip to the Fifth Circuit, and maybe to the big house. I was just sort of a little passing [69] stop along the way. I wasn't offended by that. Lo and behold I read the policy a little too carefully, and found out there really wasn't an issue there. I thought we were passed that, and here we are again.

I sure would like this issue to be teed up so I can write an opinion and it could go upstairs and maybe I could win Justice Scalia's little award that he gives at the Fifth Circuit Judicial Conference.

Just in case anyone doesn't know, that's when the trial court is reversed by the Fifth Circuit, and then the Supreme Court reinstates the wise and prudent decision of the District Court. I'm waiting for that to happen to me some day, and Justice Scalia to hand out that bird call that he passes out at the Fifth Circuit, but it's not going to happen today.

I think the issue on the merits, if Mr. Palmer were prohibited from communicating those messages, is a close question. I have reviewed the law that you have cited to me. My tentative ruling on that would be a ruling for the defense, but I think it is a close question.

I think the Jacobs case is well analyzed and well written. I will note that there is a significant

distinction in the Jacobs case that Judge Hawkins emphasizes, and that is the only verbiage that is permitted is the school logo. That's it's [sic]. It's just the school logo. It's not rah-rah [70] for the Spanish Club.

I didn't hear testimony, and I'm not satisfied really with the testimony about my example of the Gotham skeleton head Spanish club, because I don't think it's all that clear whether the school approval has to be of the club, or the school approval has to be of the shirt. But the issue of advocating political speech which is presented in this case seems to me to be overcome by the school district, which has not enforced this policy to date because of the timing, saying to me today that it is not going to prohibit Mr. Palmer from wearing a button or bumper sticker that advocates exactly what he wants to in the three permutations that are before the Court.

If it happens that Mr. Palmer is not permitted to do that, or if the school district prevents him from doing so, I will write an opinion on the merits so that it can be appealed. I don't need to have another hearing on this. You all have briefed this – I don't want to use the technical term, but I will – out the wazoo and I have read it and I understood the law. If there are new cases that come down, you will let me know. At this point I'm not going to enter a preliminary injunction, because I don't think that there is irreparable injury to the plaintiff given what I understand is the case.

I frankly would expect, and won't be surprised, if [71] Mr. Palmer shows up decorated with all kinds of bumper stickers advocating John Edwards and freedom of speech and so forth.

If the school district changes its policy, I'm requiring the school district to notify the Court immediately and requiring the parties to immediately advise the Court of what has happened and give the plaintiff permission to file a very brief supplement to the record and request injunctive relief again and I will rule quickly on it.

I'm just not going to do it today, because I don't think it's teed up for me to do it.

I will tell you, so there is no surprise about it, that my inclination on the merits is toward the defense, although I think it is a close question. I do not read Justice Alito's opinion in Morse to say that I cannot apply O'Brien in this context. I believe that the applicable test is O'Brien, even though to get there I have to ignore the distinction I mentioned to the extent I'm following Jacobs with respect to the language being limited to the logo. I think, as I say, it is a close question. It should be decided by the Circuit, and ultimately by the Supreme Court to the extent the Supreme Court hasn't already decided it.

I do not read Justice Alito's comments about there still being protected speech within the confines of a school to mean that a school district cannot have a policy which [72] prohibits students from applying to their dress – let me say that differently – from

wearing articles of clothing that convey a message that is not related to the business of education. I think that that is permissible under the cases as I have read them, and I don't think that Justice Alito's opinion in the context in which it was written holds otherwise, but this is an important question that ought to be adjudicated at least by the Circuit. If not by the Circuit, then by the Supreme Court.

I believe that the Circuit's dress code cases, I think are still good law. I know that counsel for the defense disagrees, and concludes that post Morse that we are now out of O'Brien and into Tinker only. If you're right, then if Mr. Palmer were prohibited from wearing a button or bumper sticker, then you would win.

I think it's clear that apart from this button, bumper sticker issue, the division of argument here is the plaintiffs' position is Tinker must apply, and if Tinker applies, this case doesn't fit within any of the categories, Tinker, Poolmeyer, Frasier, and therefore strict scrutiny applies, and the policy is invalid.

The defense position is that this is intermediate scrutiny at best, O'Brien, and under O'Brien the policy is a reasonable policy. I tend to agree that O'Brien is still the law that I would apply here.

[73] I will note that just as I did not find what happened before under the old policy to be terribly significant here, neither do I think it's terribly significant that a whole lot of school districts in North Texas have a similar policy.

That policy has not been adjudicated directly to be valid or invalid, and it doesn't matter to me if 100 school districts have the same policy. If it's right, it's right, if it's wrong, it's wrong, and you're not going to win it by there are a whole bunch of people doing the same. I think you're going to win it because it's right or not. If it's not, then you lose.

So the Court's ruling will be to deny the preliminary injunction. The Court concludes that the plaintiff has not satisfied its burden of proving irreparable injury in light of the Court's determination that the school district will not present Mr Palmer or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons that do the same.

If that turns out not to be the case, or if the policy is later amended to prohibit that, the Court will welcome the parties to advise the Court, and quickly and briefly – I'm not saying that critically, I mean so that I can rule quickly – supplement the record with whatever has occurred since.

I'll have a hearing if I need to. If I don't, I will [74] rule promptly so that the matter can be teed up.

I don't have to write such a lengthy opinion that I'm going to leave you all delayed. The Circuit is clearly going to want to take a look at this issue. It's actually a pretty narrow question of whether O'Brien survives post Morse. I think that's really the key question.

So if we get a factual record that indicates that Mr. Palmer's and other's rights of political expression within the school district are not permitted to be pursued, then the Court will write an opinion and give the Circuit an opportunity to rule.

* * *

2008-2009 Secondary (Grades 6-12)
Student Dress Code
Waxahachie Independent School District

In order to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students, all Waxahachie ISD secondary students (grades 6-12) must meet the expectations of the WISD Student Code of Conduct: Secondary Dress Code.

The campus principal or his/her designee will be the sole authority in deciding whether a student's dress complies with the Secondary Dress Code. Any violations of the Code must be immediately corrected at the direction of the campus principal or his/her designee.

Students, parents, teachers, and administrators must work together to assume responsibility for complying with and enforcing this Dress Code adopted by the Waxahachie ISD Board of Trustees.

General

- Students should be neatly dressed and may not wear torn or frayed clothing or clothing with holes. All apparel must be appropriately hemmed.
- The secondary campuses are a closed forum for student expression through student attire. This means that during the school day, student clothing should be free of any slogans, words or

symbols except those that promote the school district and its instructional programs.

- Students should come to school prepared to learn. Any aspect of a student's appearance or attire that is likely to distract or disrupt the learning environment, including images or messages that are lewd, vulgar, sexually suggestive, containing profanity, or promoting violation of school rules (such as promoting drug or alcohol use) are prohibited.
- All camouflage, all black, all red, all blue, etc. attire is prohibited.

Shirts, Tops, and Blouses

- Students may wear polo-style (knit) shirts, collared shirts, or blouses, Any manufacturer's logo must be 2" x 2" or smaller. Low-cut necklines, tank tops, spaghetti straps, and off-the-shoulder shirts, blouses, or sweaters are prohibited.
- Students may wear campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school "spirit" collared shirts or t-shirts. Approved t-shirts must have rounded necklines. Throughout the school year, special dress days may be scheduled by the campus principal.
- Any shirts or tops that show the torso when arms are raised above the head are prohibited.

- For female students, all untucked shirts, tops, and blouses may not extend below the middle of the thigh.
- For male students, all shirts must be tucked into the pants or shorts.

Dresses, Skirts, Shorts, and Pants

- Students may wear shorts, pants, jeans, skirts, or dresses. Any manufacturer's logo must be 2" x 2" or smaller.
- Skirts, shorts and dresses must be longer than fingertip length when the arms are held at the student's side.
- Dresses with low-cut necklines, spaghetti straps, or off-the-shoulder sleeves are prohibited.
- Pants and shorts should fit properly and must be worn around the normal waist area; sagging pants or shorts are not allowed. For male students, a belt must be worn inside the belt loops and be visible at all times.

Game-Day Attire and Outerwear

- Students may wear WISD athletic team or extracurricular club/organization "game day" attire with the approval of the campus principal in connection with the sponsor, coach or other person in charge of the extracurricular activity.
- Students may wear only solid-colored sweatshirts, hooded sweatshirts, windbreakers, jackets, sweaters, turtlenecks, vests, or coats.

Any manufacturer's logo must be 2" x 2" or smaller. Hoods may not be worn indoors.

- Students may wear WISD letter jackets or campus principal approved WISD sponsored curricular clubs and organization, athletic team, or spirit sweatshirts or hooded sweatshirts.
- Oversized outerwear is prohibited.
- Professional/Collegiate athletic team coats or jackets, trench coats, dusters, and one-piece jump suits are prohibited.
- Athletic clothing, such as warm-up suits, sweat suits, sweat pants, athletic shorts, biker shorts, spandex, overalls, coveralls, soccer or boxer style shorts, and cotton pants with drawstrings or elastic waistbands are prohibited in the academic classroom.

Accessories

- Female students may wear earrings in their ears. All other visible pierced jewelry is prohibited. Students may not wear band-aides, plastic spacers, sticks, etc. to conceal piercings.
- Students may not wear scarves, hats, caps, hoods, sweat bands, or bandanas.
- Students may not wear chains, including those attached to pants or wallets.
- Students may not wear spiked or studded clothing, jewelry, or belts.

- Students may not wear sunglasses indoors, except with a signed note from the school nurse. All sunglasses must be placed out of sight.
- Students may not wear belt buckles larger than the size of the WISD ID card. Students may wear only solid-colored belts.

Footwear

- Students must wear shoes or sandals at all times. All footwear must be appropriately fastened or tied at all times.
- Students may not wear house shoes, shoes with metal cleats, taps, or wheels on the heels or soles, or shoes that can damage or mark campus floors.

Grooming

- Male students must keep all facial hair, mustaches, sideburns, goatees, and beards neatly groomed.
- Students may use natural colored hair dye. All colors that are not deemed natural color are prohibited. Tipping or highlighting hair is permitted as long as it is a natural hair color.
- Haircuts or styles such as Mohawks, spikes, or patterns are prohibited, including any patterns in eyebrows.

Exemptions

Parents or guardians seeking an exemption from the Secondary Dress Code for their student must complete a WISD Secondary Dress Code Exemption Request Form. This form is available upon request by mail or in person in the main office. The form is also available on the WISD website. The form must be completed in full and returned to the campus principal. The parent or guardian will be asked to discuss with the campus principal the reasons and goal of the policy and the nature of the objections to the Dress Code. This meeting shall be held within ten days after receipt of the form. Based on the information provided in the Exemption Request Form and the interview with the parent, the campus principal will make a determination as to whether the exemption is granted. This decision shall be provided to the student or parent within ten days following the conference. Parents with more than one student enrolled in the District must fill out a separate WISD Secondary Dress Code Exemption Request Form for each student.

Any appeal of the campus principal's decision will be treated as a student/parent or guardian complaint under WISD Board Policy FNG (LOCAL).

Unless otherwise approved by the campus principal, the student must continue to comply with the WISD

Secondary Dress Code pending the outcome of the Exemption Meeting.

Approved by the WISD Board of Trustees
on Monday, May 19, 2008

2007-2008 Secondary (Grades 6-12)
Student Dress Code
Waxahachie Independent School District

In order to maintain an orderly and safe learning environment, all Waxahachie ISD secondary students (grades 6-12) must meet the expectations of the *WISD Student Code of Conduct: Dress Code*.

The campus principal or his/her designee will be the sole authority in deciding whether a student's appearance is a distraction and might interrupt the learning process for other students. Any violations of this Dress Code must be corrected immediately at the direction of the campus principal or his/her designee.

Students, parents, teachers, and administrators must work together to assume responsibility for complying and enforcing this Dress Code adopted by the Waxahachie ISD Board of Trustees.

Shirts, Tops, and Blouses

- T-shirts, other than WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts, are prohibited. Permitted t-shirts must have rounded necklines and sleeves or cap sleeves. The sleeves must be hemmed. Special t-shirt dress days will be scheduled throughout the school year. These special dress days must be approved by the campus principal.
- Polo-style shirts and shirts with collars are acceptable for boys and girls. Blouses or shirts

with low-cut necklines are prohibited. Tank tops, spaghetti straps, and off-the-shoulder shirts, blouses, or sweaters are prohibited. Shirts, blouses, and sweaters that show the torso when arms are raised above the head are prohibited. *All polo style (knit) shirts and shirts with collars containing pictures or slogans that are provocative, offensive, sexual or suggestive in nature, vulgar, lewd, or obscene are prohibited. Alcohol and tobacco pictures or slogans are also prohibited.*

- For girls, all un-tucked shirts, tops, and blouses may not extend below the middle of the thigh.
- All boys must tuck their shirts in their pants *or shorts. If the pair of shorts or pants does not have belt loops, the student must still tuck in their shirt.*

Dresses, Skirts, Shorts, and Pants

- All shorts, skirts, or dresses shorter than fingertip length when arms are held at one's side are prohibited. Low-cut necklines are prohibited. Dresses must have sleeves that are hemmed or cap sleeves.
- No sagging pants or shorts will be allowed. A belt must be worn inside the belt loops at all times. All pants and shorts are to be worn around the normal waist area.

Apparel and Outerwear

- Warm-up suits, sweat suits, sweat pants, biker shorts, spandex, overalls, soccer or boxer style shorts, and cotton pants with drawstrings or elastic waistbands are prohibited in the academic classroom. *As found in previous Dress Codes, athletic mesh shorts are prohibited. Examples: Nike and Addidas*

- Trench coats, dusters, and one-piece jump suits are prohibited. Professional/Collegiate athletic team coats or jackets are prohibited. *Example: Starter jackets*

- Professional/Collegiate athletic team jerseys are prohibited. WISD athletic teams or extra-curricular clubs/organizations may wear "game day" attire with the approval of the campus principal in connection with the sponsor, coach or other person in charge of the extracurricular activity.

- All hooded sweatshirts and sweatshirts with rounded necklines MUST follow the new t-shirt guidelines (example: solid, WISD, or collegiate). Of course, hoods shall not be worn indoors. All hooded sweatshirts and sweatshirts with rounded necklines do not have to be tucked in.

Accessories

- Visible pierced jewelry other than earrings on females is prohibited. Band-aides, plastic spacers, sticks, etc. to conceal body piercings are prohibited.

- Hats, caps, hoods, sweat bands, or bandanas, shall not be worn or carried indoors, except in the interest of religious practices, safety, cleanliness, or with the permission of the campus principal.
- Chains, including those attached to pants or wallets, and spiked jewelry are prohibited.
- An item of apparel or make-up that is considered extreme in dress is prohibited.
- Sunglasses may not be worn indoors, except with a signed note from the school nurse.

Footwear

- Shoes or sandals must be worn at all times. *All shoe laces must be tied at all times.*
- Shoes with metal cleats, taps, or wheels on the heels or soles, or shoes that can damage or mark floors are prohibited.
- House shoes, shower shoes, or slippers are prohibited.

Grooming

- Facial hair, mustaches, sideburns, goatees, and beards must be neatly groomed.
- Visible tattoos that are distractive or inappropriate are prohibited.
- The use of natural colored hair dye is permitted. Any colors that are not deemed natural color are

prohibited. Tipping or highlighting hair will be permitted as long as it is a natural hair color.

- Unusual haircuts or styles such as Mohawks, spikes, or excessive patterns are prohibited.

General

- Clothing, shoes, shoestrings, jewelry, bandanas, or grooming styles exemplifying gang attire or other unauthorized groups are prohibited. All black, all red, all blue, etc. attire is prohibited. *All camouflage attire is also prohibited.*
- Torn clothing and clothing with holes are prohibited.

Words and/or sentences in italics = clarifications or updates

Last clarifications and updates added:
Monday, August 6, 2007

Approved by the WISD Board of Trustees
on May 21, 2007

[LOGO] **Waxahachie**
Independent School District
411 N. Gibson Street • Waxahachie, TX 75165 •
(972) 923-4631 Phone • (972) 923-4759 Fax • www.wisd.org

October 31, 2007

Mr. Paul D. Palmer and Dr. Susan Gonzalez Baker
704 West Marvin
Waxahachie, Texas 75165

Re: Paul T. "Pete" Palmer, 10th Grade Student at Waxahachie High School Level Two Grievance Hearing

Certified Mail 7003 1680 0006 4827 9311

Dear Mr. Palmer:

On October 3, 2007 Mr. David Nix, principal of Waxahachie High School, heard a Level One complaint you filed on behalf of your son, sophomore Paul T. "Pete" Palmer. Pete was disciplined for wearing a t-shirt with the logo "John Edwards 08" emblazoned on the front. The school's dress code prohibits t-shirts, except for WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts. The gist of your complaint is that this provision of the dress code infringes Pete's right to freedom of expression under the First Amendment of the U. S. Constitution. On October 8, 2007, Mr. Nix issued a Level One decision denying your complaint, and you have appealed to me at Level Two. We conducted a Level Two conference on October 19, 2007.

I have decided to affirm the decision made by Mr. Nix. Accordingly, your Level Two Grievance is denied. If you are not satisfied with this response to your Level Two meeting, you may request a conference with the WISD Board of Trustees, in order to appeal this Level Two decision. The appeal notice must be filed in writing, on a form provided by the District, within ten days after your receipt of this response.

I have appreciated your courteous advocacy throughout, and I wish Pete all the best as he continues his education at Waxahachie High School.

Sincerely yours,

/s/ Thomas J. Collins
Thomas J. Collins
Superintendent

From: David Nix [dnix@wisd.org]

Sent: Monday, October 08, 2007 4:45 PM

To: jandopete@sbcglobal.net

Cc: David Nix

Subject: Letter

October 8, 2007

Via Hand Delivered
Mr. Paul D. Palmer and Dr. Susan Gonzalez Baker
704 West Marvin
Waxahachie, Texas 75165

Re: Paul T. "Pete" Palmer, 10th Grade Student at Waxahachie High School Level One Grievance Hearing

Dear Mr. Palmer and Dr. Gonzalez Baker:

This letter is in response to the Level One Grievance conducted on Wednesday, October 3, 2007, at 10:00 a.m. regarding Paul T. "Pete" Palmer, a sophomore at Waxahachie High School. The conference was recorded, and all applicable procedures were followed.

During the conference on October 3rd and in your letter to Ms. Johnson received by the high school on Monday, September 24th, the following contentions were discussed and/or presented:

- You assert that Pete's right to freedom of expression under the First Amendment is impacted by the school district's dress code which prohibits all writing on student t-shirts, with the exception of WISD and university sponsored writing.

After considering the evidence presented and reviewing the WISD Secondary Dress Code and WISD Board Policy, I have made the following determinations:

- Changes to the Waxahachie ISD's Secondary Dress Code were implemented for many reasons. Included in these reasons were the importance of providing a safe and orderly learning environment for all students, to decrease the number of student dress code infractions from the 2006-07 to the 2007-2008 school year, to increase the focus on life-long learning after high school, and to encourage professional and responsible dress for all students. We believe by allowing collegiate and school-sponsored spirit t-shirts we are promoting post-secondary education and WISD school spirit.

- These changes have led to decreases in dress code referrals to the main office and a noticeable improvement in hallway and classroom behavior. These changes are providing an avenue for our students to participate in an environment conducive to learning. Our assistant principals are spending less time with office referrals for dress code allowing for more time for curriculum and instruction related classroom support. At this point in time, feedback from faculty and staff members, community members, and students has been positive in nature.

- Although non-school or post-secondary messages on student t-shirts are not permitted

during the school day, our students have a number of opportunities to express themselves through the wearing of buttons, jewelry or other symbols, forming a school sponsored club, and speaking at limited public forum opportunities available during the day. Additionally, the district allows for special, spirit t-shirt dress days throughout the school year. T-shirts such as your son's political t-shirt would be permitted on those occasions. Students are encouraged to discuss ideas and possible dates for these dress days with me, their campus principal. Pete may also wear his t-shirt after school hours and in extracurricular activities in which compliance with the Secondary Student Dress Code is not required.

- I am available to assist your son with the formation of an approved Waxahachie High School club or organization, such as a "Waxahachie High School Students for Edwards" club. This would allow Pete the opportunity to express support for the political candidate of his choice through a school-sponsored organization. I am happy to assist Pete in finding a campus sponsor, arranging for announcements to be made regarding membership opportunities, and facilitating the approval and creation of a school-sponsored club or organization t-shirt.

While I respect your view that Pete has the right to express himself, the Board of Trustees of this District has placed time, place and manner restrictions on such expression. The purpose of these restrictions is

to enhance the learning environment in our schools. Pete has a number of alternative methods for engaging in political expression, and I am available to assist him in finding opportunities for him to express himself within our school rules. Based on these determinations, I hereby deny the relief requested in connection with this Level One Grievance.

If you are not satisfied with this response to your Level One meeting, you may request a conference with the Superintendent, Mr. Thomas J. Collins, or designee, to appeal my Level One decision. The appeal notice must be filed in writing, on a form provided by the District, within ten days after receipt of this response.

Sincerely,

David Nix
Level One Hearing Officer
Principal, Waxahachie High School

Every Student. Every Chance. Every Day.

No.09-409

In the Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians PAUL D. PALMER AND SUSAN GONZALEZ BAKER

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether intermediate scrutiny, the standard this Court traditionally uses to assess content-neutral regulations of speech, is the proper standard to assess the constitutionality of a content-neutral school dress code?

2. Whether the court of appeals correctly applied that standard to the facts of this case?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. Factual Background

This case challenges the constitutionality of a comprehensive, school-wide dress code adopted to "maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students." Pet. App. 30. Respondent Waxahachie Independent School District (Waxahachie) adopted the dress code after finding that student dress issues consumed too much administrative time and attention, Tr. 20:1-21:3, and that limiting printed messages on clothing would reduce distractions in the classroom, allowing students to better focus their attention on schoolwork. Tr. 22:4-11. In developing the dress code, no school official ever expressed an intent or desire to regulate or suppress student political speech or any particular message. Tr. 22:4-11; Tr. 28:6-12; Tr. 34:18-23.

Before implementing the dress code, school officials engaged in an extensive policy development and review process. Tr. 18:5-22:3; Tr. 24:21-26:14. School officials reviewed over forty other school dress codes, took trips to see dress code enforcement in action, and reviewed data regarding the impact of such codes on other schools. Pet. App. 17.

Waxahachie learned that discipline had improved in those schools and that stricter dress standards had furthered the schools' educational missions and improved safety and security. Tr. 25:11-26:12; Tr. 18:6-23. Though it considered requiring school uniforms, Waxahachie ultimately adopted a dress code, believing that educational objectives could still be served while allowing students some choice in the style of their clothing. Tr. 26:15-27:12; Pet. App. 3 n.2.

Waxahachie adopted its dress code on May 21, 2007. Pet. App. 41. The initial version prohibited students from wearing printed messages on t-shirts unless the messages related to school clubs, school spirit, school sports teams, or a university. Pet. App. 37. Other portions of the dress code prohibited low-cut necklines, spiked jewelry, torn clothing, and too-short shorts, skirts or dresses. Pet. App. 38-41.

On September 21, 2007, petitioner, Paul ("Pete") Palmer, went to school wearing a t-shirt with "San Diego" written on it. Pet. App. 2. An assistant principal told him that his shirt violated the dress code, *id.*, and that he would not be permitted to return to class until he changed into acceptable clothing. 3 R. 431. Petitioner then called his parents and asked his father to bring his "John Edwards for President '08" t-shirt for him to wear instead. *Id.* at 430-431. The assistant principal told him that he would not be allowed to wear the Edwards t-shirt because it also contained a printed message. Pet. App. 2. Petitioner put on a plain t-shirt and returned to class. His parents later filed an appeal using the

school grievance process. The principal denied petitioner's appeal, and the district superintendent agreed. *Id.*

B. Proceedings in the District Court

In the spring of 2008, the District began an internal review of the dress code, and began considering changes. On April 1, 2008, petitioner sued Waxahachie under 42 U.S.C. § 1983, claiming that the dress code violated his freedom of speech under the First Amendment. Pet. App. 2. He requested, among other things, a preliminary injunction. *Id.* Four days prior to the district court hearing, Waxahachie amended the dress code after reviewing the recommendations of the administrative committee tasked with revising the policy. *Id.* at 3. The district court dismissed petitioner's motion for a preliminary injunction without prejudice. *Id.*

Waxahachie had tightened its policy to prohibit all but school-related messages on student clothing after finding that students had taken advantage of the prior exceptions to promote gang affiliation. Pet. App. 3. The new dress code continued to permit shirts printed with school-related messages. *Id.* at 3. It also permitted manufacturer's logos no larger than two inches by two inches. *Id.* at 31. While the dress code did not explicitly address accessories like political pins, buttons, or wrist bands, such items were covered, if at all, by Waxahachie's general policy that permits such items unless they are distracting, sexually explicit, or promote the violation of school rules. Pet. App. 4.

After receiving a copy of the revised dress code, petitioner submitted three shirts to Waxahachie for its reaction. Pet. App. 4. One was the original "John Edwards for President '08" t-shirt, one was a "John Edwards for President" polo shirt, and one was a t-shirt with "Freedom of Speech" printed on the front and the text of the First Amendment printed on the back. Waxahachie advised him that all three shirts would violate the dress code. *Id.*

Petitioner amended his Complaint in district court to challenge the new dress code. Pet. App. 4. The district court denied his request for a preliminary injunction, finding that he would not suffer irreparable harm because the dress code did not prevent him from conveying political messages through alternative means, like campaign buttons. *Id.* The district court never examined the remaining three requirements for a preliminary injunction: whether there was a substantial likelihood of success on the merits; whether the threatened injury if the injunction were denied would outweigh any possible harm resulting from the injunction being granted; and whether granting the injunction would not disserve the public interest. See Pet. App. 4-5.

C. Proceedings in the Court of Appeals

Petitioner appealed, challenging the district court's holding that denying a preliminary injunction would not cause him irreparable injury. Pet. C.A. Br. 20. The Fifth Circuit held that denying the preliminary injunction would indeed cause such

injury, assuming that petitioner's First Amendment rights were in fact being violated. Pet. App. 5. The court then examined whether petitioner could establish a substantial likelihood of success on the First Amendment point.

The Fifth Circuit began with this Court's admonition in *Tinker* v. *Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969), that "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Pet. App. 6 (quoting *Tinker*, 393 U.S. at 506), and summarized *Tinker*'s holding as "[s]chools can restrict student speech only if it materially interferes with or disrupts the schools' operation and cannot suppress expressions of feelings with which they do not wish to contend." *Id.* at 7 (internal quotation marks and citations omitted). It then noted that "since *Tinker*, every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate," and described these subsequent holdings as allowing schools to prohibit sexually explicit, indecent, or lewd speech, *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), to regulate school-sponsored speech, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988), and to prohibit speech "advocating illegal drug use," *Morse* v. *Frederick*, 551 U.S. 393, 403 (2007). *Id.*

The Fifth Circuit rejected petitioner's argument that these decisions established a "bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related." Pet. App. 7. Such a "categorical rule," it held, was

"flawed, because it fails to include another type of student speech restriction that schools can institute: content-neutral regulations." *Id.* at 7-8. The Fifth Circuit explained that the *Tinker* line of cases "all addressed disciplinary action by school officials directed at the political content of student expression, not content-neutral regulations such as school uniforms." *Id.* at 8 (internal quotation marks omitted). Viewpoint- and content-neutral regulations of school speech, the court therefore held, are not governed by the *Tinker* line of cases but by the traditional standard used to assess such regulations outside of school: intermediate scrutiny, as first articulated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968); Pet. App. 8–9.

In so holding the Fifth Circuit followed its earlier decision in *Canady* v. *Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001). *Canady*, as the Fifth Circuit noted, has itself been followed by three other circuits, see Pet. App. 9 & n.6 (citing *Bar-Navon* v. *Brevard County Sch. Bd.*, 290 F.App'x 273, 276–277 (11th Cir. 2008); *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 428–434 (9th Cir. 2008); *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 392–393 (6th Cir. 2005). No court of appeals, by contrast, has expressed disagreement with *Canady*.

The Fifth Circuit rejected all three of petitioner's arguments that *Canady* should not control. First, it held that "[n]othing in Justice Alito's concurrence or the majority opinion in *Morse* overruled *Canady*." Pet. App. 10. That case, it found, "involved a school's targeting specific speech and did not concern content-

neutral regulation," a distinction it found "critical and controlling." *Id.* Second, it rejected petitioner's attempt to distinguish *Canady* as involving "a uniform rather than a dress code" as making "a distinction without a difference." *Id.* at 11. "A uniform code," it noted, "is merely a strict version of a dress code" and petitioner's distinction, if accepted, "would spawn endless line-drawing litigation" because courts would have to "decide when a dress code is strict enough to be considered a uniform." *Id.* The court further noted that to treat dress codes differently from uniforms "would punish those school districts that adopt dress codes rather than uniforms because their students cannot afford uniforms" and would "perverse[ly] push[ ] schools to adopt uniforms rather than dress codes that give students some clothing choice." *Id.* Third, it rejected petitioner's argument that *Canady* applied only to facial, not to as-applied, challenges to dress codes. That position, it found, "make[s] no sense." *Id.* Intermediate scrutiny should apply in both contexts. *Id.* at 11–12.

The Fifth Circuit then considered whether Waxahachie's dress code was content-neutral. Pet. App. 12. Petitioner argued that the dress code was in fact a content-*based* restriction since it allowed students to wear brand name clothing with modestly-sized logos or shirts bearing school-related messages, but not those with messages non-germane to the school environment. *Id.*; Pet. C.A. Br. 19 n.6; see also Pet. C.A. Reply Br. 11. The Fifth Circuit noted, however, that this Court had held that "[t]he principal inquiry in determining content-neutrality * * * is whether the government has adopted a

regulation of speech because of disagreement with the message it conveys." *Id.* at 13 (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), *reaff'd in Hill* v. *Colorado*, 530 U.S. 703, 719 (2000)). Under that test, it held, "the dress code is content-neutral." *Id.* at 14. The court held that Waxahachie is in no way attempting to suppress any student's expression, and its allowance for school logos and school-sponsored shirts "does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages." *Id.*

The court of appeals then applied the intermediate scrutiny test from *O'Brien*. Under that test, a content-neutral regulation passes constitutional muster: (1) "if it furthers an important or substantial government interest;" (2) "if the interest is unrelated to the suppression of student expression;" and (3) "if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." Pet. App. 8 (citing *Canady*, 240 F.3d at 443).

Petitioner challenged the dress code only under the first and third prongs of the test, arguing that the dress code did not further "an important or substantial governmental interest." Pet. App. 15.

Waxahachie asserted that the dress code furthered several important interests, including "maintain[ing] an orderly and safe learning environment, increas[ing] the focus on instruction, promot[ing] safety and life-long learning, * * *

encourag[ing] professional and responsible dress for all students[,] reduc[ing] administrative time spent enforcing the code, and promot[ing] the school and its activities." Pet. App. 15. The court of appeals held that "[Waxahachie's] stated interests *all* qualify under the first prong [of intermediate scrutiny.]" *Id.* at 16 (emphasis added).

It noted, moreover, that petitioner was actually making a different argument. He did "not take issue with the school board's claimed interests" but instead argued that permitting political statements on pins, wrist-bands, and other accessories nullified these proffered benefits. Pet. App. at 17. The court of appeals found, however, that the distinction between messages on shirts and on accessories made sense:

> Because shirts are large and quite visible, banning them while allowing buttons would still cause less distraction and promote an orderly learning environment. Buttons and pins are also less prominent than are shirts and therefore require less attention from and regulation by teachers. Another District goal—promoting professional and responsible dress—still functions as well, because students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not.

Id. at 18. And "even if, *arguendo*, [it] were to find the distinction between messages on shirts and messages on buttons odd, [the court of appeals] recognize[d] that the teachers and administrators who establish these rules know better than [the courts] how the distinction will function in schools." *Id.* "The determination of where to draw lines on dress code decisions 'properly rests with the school board, rather than with the federal courts.'" *Id.* at 19 (quoting *Hazelwood*, 484 U.S. at 267).

Petitioner's argument, the court also noted, was "somewhat ironic." Pet. App. 19. He "requests that [the court] strike down the dress code *because* the District gave him [other avenues] to express himself. He argues that, to survive intermediate scrutiny, the code must allow him no options at all." *Id.* It rejected this "perverse reasoning" because it would cause "school districts [to] rush to impose the strictest dress code possible or * * * require school uniforms." *Id.*

Finally, the Fifth Circuit held that "[the dress code] passes [intermediate scrutiny's] third prong." Pet. App. 21. Since "[it did] not restrict student dress outside of school and provide[d] students with some means to communicate their speech during school," the court of appeals found, the policy restricted no more speech than was "necessary to achieve [Waxahachie's] goals." *Id.* at 20–21. It thus affirmed the district court's denial of a preliminary injunction.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT INTERMEDIATE SCRUTINY APPLIES TO CONTENT-NEUTRAL REGULATIONS OF STUDENT SPEECH, AS HAVE ALL OTHER CIRCUIT COURTS FACED WITH THE QUESTION

A. There Is No Circuit Split Regarding the Constitutional Status of Content-Neutral Regulations Of Student Speech

Contrary to petitioner's contention, Pet. 19–23, there is no conflict among the courts of appeals over the constitutional standard governing First Amendment challenges to content-neutral regulations of student speech in public schools. Petitioner claims that a split exists between the Fifth, Ninth, and Sixth Circuits, all of which decline to apply the *Tinker* disruption standard to content-neutral regulations of student speech, and the Second and Third Circuits, which petitioner claims apply the *Tinker* standard to such regulations. Pet. 14–25.[1] This claim blurs the

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[1] Petitioner also cites to a non-precedential decision from a Florida district court for the proposition that the courts disagree as to the scope of *Tinker*'s holding. Pet. 19 (quoting *Bar-Navon* v. *Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007)). In fact, the Eleventh Circuit, in an unpublished decision in the same case, upheld the application of intermediate scrutiny to a content-neutral school dress code. *Bar-Navon* v. *Brevard Cty. Sch. Bd.*, 290 Fed. App'x at 277.

clear distinction between viewpoint-neutral regulations that incidentally impact student expression and school regulations that censor a particular viewpoint.

Neither this Court nor any court of appeals has ever applied the *Tinker* disruption test to content-neutral regulations of student speech. The Fifth Circuit joins the Sixth and Ninth Circuits in holding that intermediate scrutiny applies to content-neutral regulations, such as student dress and grooming policies. The Second and Third Circuit decisions relied on by petitioner, by contrast, involve content- or viewpoint-based restrictions, and therefore do not pose any conflict over the proper standard to apply to content-neutral regulations.

In a strikingly similar dress code case, the Ninth Circuit in *Jacobs* explained that "the *Tinker* test has only been employed when a school's restrictions have been based, at least in part, on the particular messages students were attempting to communicate." 526 F.3d at 431. In a carefully reasoned and thorough decision, the court concluded that intermediate scrutiny, which is the standard applied to content-neutral regulations of speech outside of schools, should apply within schools as well.[2] *Id.* at 434.

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[2] The *Jacobs* court noted that "[i]f anything, the scrutiny should be even less demanding," as "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and * * * the rights of students must be applied in light of the special characteristics of the school environment.'" 526 F.3d at 434 n.34 (quoting *Morse* v. *Frederick*, 551 U.S. 393, 396–397 (2007)).

The Sixth Circuit has also declined to apply the *Tinker* disruption test to content-neutral regulations of student speech. In *M.A.L.* v. *Kinsland*, 543 F.3d 841 (6th Cir. 2008), the court analyzed restrictions on student distribution of leaflets in the hallways during school hours. The *Kinsland* plaintiffs argued that content- and viewpoint-neutral regulations on literature distribution should be subject to the *Tinker* test and therefore held invalid unless the distribution was likely to cause substantial disruption. *Id.* at 845–846.

The court emphatically rejected the argument that *Tinker* should apply to content-neutral regulations of student speech, emphasizing that "the school officials in *Tinker* sought to silence the student because of the particular viewpoint he expressed, while the Jefferson school authorities have merely sought to regulate the time, place, and manner of [plaintiff's] speech irrespective of its content or his viewpoint." *Id.* at 849. Thus the school district "need not satisfy [*Tinker*'s] demanding standard merely to impose a viewpoint-neutral regulation of the manner of [plaintiff's] speech to prevent hallway clutter and congestion." *Id.* at 850. To hold otherwise, the court observed, "would produce numerous legal anomalies, the most obvious of which is that schools would have less discretion over the use of school facilities than is exercised by any other public entity over any other forum on public property. This is not the law." *Id.* See also *Blau*, 401 F.3d at 391–393 (applying intermediate scrutiny to uphold a content- and viewpoint-neutral dress code).

The Fifth Circuit recently reaffirmed the application of intermediate scrutiny to content-neutral school regulations that impact student speech in *Morgan* v. *Plano Indep. Sch. Dist.*, --F.3d.--, 2009 WL 4265219. "We have made plain that time, place, and manner is the proper standard for evaluating content and viewpoint neutral regulations of student speech and [only] when a school imposes content or viewpoint based restrictions the court will apply *Tinker*." *Id.* (internal quotations and citations omitted.)

The Sixth Circuit, together with the Fifth and Ninth Circuits, are the only courts to address the constitutional status of content-neutral dress code regulations in schools. For dress regulations, like other content-neutral regulations impacting student speech, these courts of appeals have consistently and correctly decided that intermediate scrutiny is the proper standard and that *Tinker* does not apply.

The decisions of the Second and Third Circuits cited by petitioner are not to the contrary because those cases directly involved content- or viewpoint-*based* speech restrictions. In *Guiles* v. *Marineau*, 461 F.3d 320 (2d Cir. 2006), a student was disciplined for wearing a t-shirt critical of President George W. Bush as the "Chicken-Hawk-In-Chief" and an abuser of alcohol and drugs. *Id.* at 326. The court applied *Tinker* because both *Tinker* and the case at hand presented "political viewpoint-based discrimination." *Id.* Similarly, *Saxe* v. *State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), involved a challenge to

an anti-harassment policy, which the court explicitly determined involved content-or viewpoint-based restrictions on student speech. The court cited and applied *Tinker* because "school[s] may not prohibit speech based on the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular *viewpoint*." *Id.* at 215. (internal quotation marks and citation omitted, emphasis added). Neither court addressed what standard might govern content- and viewpoint-*neutral* regulation of student speech. Consequently those decisions are not in conflict with the decision in this case.

Petitioner attempts to concoct a conflict from dicta. Petitioner quotes language from the Second and Third Circuit opinions, divorced from the factual contexts of those cases, which he contends establishes that those courts would apply the *Tinker* standard to content-neutral regulations of student speech. Pet. 20. That amounts to speculation, given that the cases did not involve content-neutral regulations. A speculative conflict is no substitute for a real one, as the Ninth Circuit's experience illustrates. In 1992, in a viewpoint discrimination case, the Ninth Circuit broadly declared "that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*." *Chandler* v. *McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (citations omitted and emphasis added). Then 16 years later, the court encountered for the first time a content-neutral student dress code. In *Jacobs*, the court eschewed

Tinker and instead found itself obliged to apply intermediate scrutiny, clarifying its broad declaration in *Chandler* and distinguishing that decision – as well as *Tinker* – on the ground that it involved a viewpoint-based restriction on speech and thus did not control. 526 F.3d at 428–432.

Petitioner cites to cases from the Fourth and Seventh Circuit, but significantly, he does not claim they are in conflict with the Fifth Circuit. Those decisions, just as in the Second and Third Circuits, involved content-based speech restrictions. As with *Saxe*, the Seventh Circuit, in *Nuxoll* v. *Indian Prairie Sch. Dist.*, 523 F.3d 668 (7th Cir. 2008), applied *Tinker* to a policy prohibiting written or oral "derogatory comments" referring to "to race, ethnicity, religion, gender, sexual orientation, or disability." *Id.* at 670. Judge Posner described the issue in *Tinker* as "discriminat[ion] against a particular point of view, namely opposition to the Vietnam war expressed by the wearing of black armbands." *Id.* at 674. Nor was the Fourth Circuit faced with a content-neutral restriction in *Newsom* v. *Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003). The dress code in *Newsom* prohibited "messages on clothing * * * that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group," and the student in that case was prohibited from wearing a t-shirt depicting weapons because of the assistant principal's disagreement with the message it conveyed. *Id.* at 252–253.

There is no disagreement, much less a deep division, among the courts of appeals. All circuits that have addressed viewpoint-neutral regulation of student speech have come to the same conclusion as the Fifth Circuit, and with all relevant courts in agreement, review by this Court is unwarranted.

B. Intermediate Scrutiny Is The Proper Standard For Content-Neutral Regulation of Student Speech

The Fifth Circuit correctly decided to apply intermediate scrutiny to content-neutral school dress codes.[3] As this Court famously declared in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. But neither do students and teachers *acquire* additional rights at the schoolhouse gate. Extending *Tinker* as urged by petitioner would, anomalously, grant students in public schools greater

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[3] The Fifth Circuit was correct to apply intermediate scrutiny to the school's dress code under both the test for restrictions on expressive conduct, articulated in *O'Brien*, as well as the so-called "time, place, and manner" test for viewpoint- and content-neutral restrictions on "pure speech." This Court's application of those tests confirms that there is "little, if any, differen[ce]" between the two tests. *Clark* v. *Comty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 661–662 (1994). Petitioner's suggestion, made in the questions presented, see Pet. i, that it is incorrect to apply intermediate scrutiny to content-neutral regulations of "pure speech" is thus without merit.

free speech protections than adults have outside of school.

While this Court has addressed the extent to which schools may engage in content- or viewpoint-*based* regulation of speech, the Court has never indicated that content-neutral regulations, such as uniform and dress codes, are impermissible in schools if they also restrict some non-disruptive speech. It is clear from *Tinker* and its progeny that students in public schools have speech rights, but because of the need "to prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507, the scope of speech protections is specially-tailored to the school setting. *Tinker* and the school speech cases that followed arose in the context of regulations discriminating based on content or viewpoint Petitioner nonetheless argues that *Tinker* and its progeny preclude the application of intermediate scrutiny to a content-neutral dress code. This view turns the *Tinker* line of cases on its head.

Justice Alito's concurrence in *Morse* v. *Frederick*, 551 U.S. 393 (2007) does not further petitioner's argument. In *Morse*, the student was disciplined for displaying a banner expressing a pro-drug use viewpoint. Justice Alito's concern was with the dangerous breadth of the "educational mission" argument advanced by the petitioners and the United States, which he saw as potential license for viewpoint discrimination: "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint

expressed. The argument, therefore, strikes at the very heart of the First Amendment." *Morse*, 551 U.S. at 423 (Alito, J., concurring)

Justice Alito wished to foreclose any interpretation of the majority opinion that would authorize school boards to engage in viewpoint discrimination by the simple expedient of adopting a converse point of view as their "educational mission." But Justice Alito was dealing with the viewpoint discrimination case before him, not a dress code. Accordingly, Justice Alito "join[ed] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Morse*, 551 U.S. at 422 (Alito, J., concurring).

But the application of intermediate scrutiny to content-neutral regulations is not based on "the special characteristics" of the school setting. It is a generally applicable speech rule. This Court has never suggested that students have *more* free speech protections in school than outside of them.

Even adults in public settings may have reasonable restrictions placed on the exercise of their speech rights: "the First Amendment does not guarantee the right to communicate one's view at all times and places or in any manner that may be desired." *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Even in traditional public forums, such as a park or a public street, the government may impose reasonable

restrictions on the time, place or manner of protected speech. See, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Hill* v. *Colorado*, 530 U.S. 703, 720 (2000) (upholding limits on approaching another for the purpose of "engaging in 'oral protest, education, or counseling'"); *United States* v. *Kokinda*, 497 U.S. 720 (1990) (upholding prohibition against soliciting on a sidewalk adjacent to a post office); *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 684 (1992) (upholding restrictions on speech rights in airport terminals); *City Council of City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (applying intermediate scrutiny to prohibition against posting of signs on sidewalks, utility poles, and similar public structures).

Tinker does not change those fundamental principles of First Amendment law in their application to a school context. Expression by students in school may be limited by reasonable and equally applied time, place, and manner restrictions. *Shanley* v. *N.E. Indep. Sch. Dist.*, 462 F.2d 960, 970 (5th Cir. 1972). Under petitioner's reading of *Tinker*, schools would transform not merely into a public forum, but a super-public forum, in which time, place, and manner limitations are invalid.

Petitioner seeks to create a false dichotomy between the rule articulated in *Tinker* and the standard laid down in *O'Brien*. But *Tinker* is not, as petitioner asserts, distinguishable from cases like *O'Brien* and *Canady* because *Tinker* deals with "pure

speech" while the other cases deal with expressive conduct. *Tinker* itself involved expressive conduct–the silent wearing of plain black armbands. 393 U.S. at 504. As with burning a draft card, sleeping in a public park, or wearing non-uniform school clothes, it was the expressive content of the wordless conduct that brought First Amendment considerations into play. See *id.* at 505; cf. *Clark*, 468 U.S. at 298–299. The relevant distinction is not in the form of the expression but in the form and scope of the regulation.

Tinker involved a ban against black armbands because the wearers intended to express a particular viewpoint. The school district permitted the wearing of political buttons and other politically-charged symbols like the Iron Cross but singled out black armbands for prohibition because they were being worn to oppose the war in Vietnam. 393 U.S. at 510–11. It was not the prohibition of armbands or other apparel items in general, but the suppression of one particular opinion without evidence of material and substantial interference with schoolwork or discipline that was not constitutionally permissible. *Id.* at 511.

Tinker remains the rule for testing the validity of a viewpoint–based regulation of student speech in public schools. But it says nothing about the validity of a content- and viewpoint–neutral policy that restricts students' clothing only during school hours reserved for the schools' core mission of education. See *Jacobs*, 526 F.3d at 432. Like the statute upheld in *Hill* v. *Colorado*, Waxahachie's dress code is not a

regulation of speech so much as a regulation of the places where and times when some speech may occur. 530 U.S. at 719. *Tinker* is not a stand-alone doctrine that transforms schools into super–public forums in which students enjoy rights greater than adults in traditional forums. Reasonable time, place, and manner restrictions on permitted expression–like those in Waxahachie's dress code–are governed by First Amendment jurisprudence other than *Tinker*. See, *e.g.*, *Linmark Assocs., Inc.* v. *Willingboro Twp.*, 431 U.S. 85, 93 (1977) ("[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.").

The Ninth Circuit clearly articulated the rationale of this approach in *Jacobs*. The court began by noting that *Tinker* did not fully resolve "the question of how restrictions upon expressive conduct in schools should be evaluated" and that "the holding itself extends only to viewpoint-*based* speech restrictions, and not necessarily to viewpoint-*neutral* speech restrictions." *Jacobs*, 526 F.3d at 430. The court then explained why intermediate scrutiny should apply to content-neutral regulations, such as uniform and dress codes:

> Applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct (or, as is the case here, do both) not only strikes the correct balance between students' expressive rights and schools' interests in furthering their educational

> missions, but, as the Fifth Circuit explained, is entirely consistent with the Supreme Court's other school speech precedents, not to mention the remainder of the Court's First Amendment jurisprudence.

Id. at 434. Like all the other courts of appeals that have addressed this issue, the Ninth Circuit held that a content-neutral dress code passed constitutional muster. *Id.* at 428–437.

The approach taken by the Fifth Circuit in this case is necessary to the proper functioning of public schools in the United States. Petitioner's proposed rule would effectively invalidate not only dress codes like the one here, but uniform codes as well. A uniform code would certainly qualify as a content-neutral regulation incidentally burdening speech. Yet under petitioner's broad rule, not even important government interests and narrow tailoring could justify a uniform code if, in its application, it prohibited a single student from wearing a "John Edwards" or "San Diego" t-shirt—as it necessarily would. School districts around the country are looking closely at what dress and uniform code options they have to ensure that our public schools are safe and effective educational environments. Petitioner would take many of these options off the table, effectively handcuffing school boards in this pursuit.

II. PETITIONER'S SECOND QUESTION DOES NOT MERIT THIS COURT'S REVIEW

A. The Second Question Concerns The Application of Well-Established Precedent To The Facts Of This Case

Petitioner also asks this Court to review whether the Fifth Circuit correctly applied intermediate scrutiny to the facts of this case. This question does not warrant review. There is no conflict among the circuits on this point. Petitioner is thus left to argue that the Fifth Circuit erred in its application of well-established precedent to the specific facts of this case. Correcting the fact-bound application of settled law does not, ordinarily, supply a basis for granting certiorari. Even if it did, there is no error to correct in this case.

B. The Court Of Appeals Properly Applied Intermediate Scrutiny To The Facts Of This Case

The Fifth Circuit applied the well-known intermediate scrutiny test first set forth in *O'Brien*, 391 U.S. at 377. As the court explained, to pass this test, the dress code: (1) must "further[ ] an important or substantial government[al] interest;" (2) the interest must be "unrelated to the suppression of student expression;" and (3) "the incidental restrictions on First Amendment activities [must be] no more than is necessary to facilitate that interest." Pet. App. 14–15 (internal quotation marks omitted). Petitioner challenged only the first and third prongs

of the test, and the court of appeals correctly held that he did not show a likelihood of success on the merits.

The court first held that *all* of the school's stated interests were undoubtedly of sufficient importance to survive intermediate scrutiny. Pet. App. 16. The court stated that it is difficult to conceive "of a governmental interest more important than the interest in fostering conducive learning environments for our nation's children." *Id.* (internal quotation marks omitted) (quoting *Jacobs*, 526 F.3d at 435–436). The court found that the dress code furthered these interests by reducing the distractions created by large logos and messages, and by preparing students for a "working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not." Pet. App. 18.

The court also found that reducing time spent administering the code was important to furthering the school's educational mission, as was promoting school spirit. *Id.* at 16. And properly so–after all, time teachers expend determining compliance with the code is time not spent teaching. Under the third prong of the analysis, the court then found that the restriction was not broader than necessary because the dress code affected students only during the school day and did not affect other means of communication. *Id.* at 20–21.

Petitioner does not question the importance of the school's interests, but instead argues that "these

interests do not apply, because the board's ban on shirts is undermined by allowing students to wear pins, buttons, wrist-bands, and bumper stickers containing messages." Pet. App. 17. His problem with the dress code, presumably, is that it does not restrict *enough* speech.

As the court of appeals observed, that is an argument that is both ironic and perverse. Pet. App. 19–20 (quoting *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 540 (1981) (Stevens, J., dissenting in part)). It is ironic because it would require "that, to survive intermediate scrutiny, the code must allow him no options at all." Pet. App. 19. It is perverse because it would put Waxahachie to a Hobson's choice. If alternative forms of expression are not permitted, Waxahachie cannot show that its code is no stricter than necessary under the third prong of intermediate scrutiny. If they are permitted, according to petitioner, the entire code fails for failing to advance the school's interests. The court of appeals properly declined to subject schools to this dilemma. *Id.* at 19–20.

In assessing the school's dress code—and doing so in the context of a preliminary injunction—the Fifth Circuit was appropriately sensitive to the school environment. School administrators and teachers need sufficient flexibility to advance the goals of educating the nation's youth. See, *e.g.*, *Hazelwood*, 484 U.S. at 267. In this case, the school undertook a careful process to formulate a dress code that was easily administered yet permitted alternative avenues of expression. After some experience with

that code and further study, the school amended it to reduce the opportunities for gangs to signal membership through their choice of clothing. See Pet. App. 3 n.2. School officials should be encouraged to find ways of balancing the rights of students with the need for an orderly learning environment, while maintaining their ability to adapt to new and unforeseen circumstances.

The court of appeals displayed proper sensitivity to the school's need for discretion and its comparative advantage in knowing how to design a workable dress code while respecting the speech rights of students. Petitioner's argument that the Fifth Circuit erred in its application of intermediate scrutiny to the facts of this case is without basis, as is his fleeting attempt to bolster the significance of the decision by suggesting without explanation that it has broad implications beyond the school context. See Pet. 30.

III. THE INTERLOCUTORY POSTURE OF THIS CASE MAKES REVIEW UNNECESSARY AND UNWISE

This Court's practice establishes that review of interlocutory decisions, such as the denial of a preliminary injunction, should only be undertaken in extraordinary circumstances. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); see also *American Constr. Co.* v. *Jacksonville, T. & K.W. R.R. Co.*, 148 U.S. 372, 384 (1893); *Va. Military Inst.* v. *United*

States, 508 U.S. 946 (1993) (Opinion of Scalia, J., respecting denial of the petition for writ of certiorari).

There is nothing extraordinary about this case. It involves a First Amendment challenge to the dress code of a single school, which hardly makes it unique. It also involves a well-reasoned decision that is consistent with the views of all other circuits to have considered the same question.

Adhering to the policy against interlocutory review is especially sensible in this case, as a decision by this Court would not even decide the preliminary injunction issues, much less the merits. There are four distinct criteria which must be met for a court to grant a preliminary injunction. The courts below only considered two–irreparable harm and likelihood of success on the merits. Thus, even if Petitioner were to succeed before this Court, the courts below would still have to consider the balance of harm and the public interest before deciding whether to grant a preliminary injunction. The case is hardly ready for review here.

This is not a case, moreover, where partially resolving the preliminary injunction would in effect decide the merits of the case. If the Court affirmed the application of intermediate scrutiny, both Petitioner and respondent would be entitled to introduce more evidence to bolster their contentions. The district court never resolved, for example, whether all school-related t-shirts have to be individually approved by the principal or whether the t-shirts simply have to relate to extracurricular clubs

and organizations that have themselves been approved by the principal. See Pet. App. 25 ("I don't think it's all that clear whether the school approval has to be of the club, or the school approval has to be of the shirt.").

Even if this Court were to apply *Tinker*, the question of whether petitioner's conduct posed a threat of substantial disruption would have to await later resolution on the merits. Waxahachie stipulated only that the original "John Edwards" t-shirt sought to be worn on September 21, 2007 was not disruptive under the circumstances of that single day. Waxahachie has never conceded that allowing repeated exceptions to its dress code would not cause disruption. See Pet. C.A. Br. 13–14; Answer to Plaintiff's Amended Verified Complaint 6, 8; Agreed Stipulation of Facts ¶ 11. The larger questions of disruption and threat of disruption remain unanswered and cannot be decided on this limited factual record. At best, this Court could only partially resolve the preliminary injunction and the merits. That consideration alone should foreclose review.

IV. PETITIONER'S ATTEMPT TO RAISE THE QUESTION OF WHETHER THE DRESS CODE IS CONTENT-BASED OFFERS ANOTHER REASON TO DENY THE PETITION

In framing the issues, petitioner concedes the content-neutrality of the dress code as indeed he must to assert that the circuits are split over

content-*neutral* regulations of student speech. Pet iii. He argues in particular that this case presents an "optimal" or "ideal" vehicle for resolving the supposed conflict. Pet. 2, 14-25.

In the courts below, petitioner argued just the opposite–that the dress code was the very model of a content-based restriction, and for that reason the *O'Brien* test should not apply.[4] Pet. C.A. Br. 41 n.6. Petitioner repeats that argument here, albeit rather softly. Down in a footnote, for example, petitioner murmurs that the Fifth Circuit erred in "deem[ing] the restriction on Pete's political speech content neutral." Pet. 9 n.1. Later, petitioner frets over the Fifth Circuit's failure to grasp that "the speech restriction actually challenged by Pete" was "why a policy banning some words and allowing others approved by the government is content neutral." Pet. 28. Yet the only questions petitioner presents for this Court's review clearly assume that Waxahachie's dress code *is* content neutral. Pet. i.

So which is it to be? In continuing to argue that the dress code was actually content-*based*, petitioner defeats his own assertion that this case presents an "optimal vehicle" for reviewing a content-*neutral* dress code. Pet. 2. Petitioner cannot frame one set of

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[4] *Amici* in support of the petition also argue that the Fifth Circuit erred in concluding that respondent's dress code is content-neutral. See, *e.g.*, Br. for Cato Institute, et al., as *Amici Curiae* at 13–18. Indeed, some *amici* explicitly argue that "[t]his Court should grant the writ because the school district's dress code is not content-neutral." Br. for Baruch & Walker as *Amici Curiae* at 10–11.

questions in seeking this Court's review, but then turn around and slip a quite different question under the door in the body of his petition. Whether the dress code was content-based could not be reached by this Court if review were granted, as that issue is not "fairly included" in the questions presented. See Sup. Ct. R. 14.1(a); see also, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 388 (1994). Nonetheless, petitioner's persistence in advancing this argument ensures that it will remain a point of contention at the merits stage, rendering this case far from an "optimal vehicle" for addressing the questions actually presented by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that the First Amendment prohibits the censorship of non-disruptive, political student speech in public schools. The Fifth Circuit—along with the Sixth and Ninth Circuits, but in conflict with the Second, Third, and Fourth Circuits—has held that the First Amendment does *not* prohibit the censorship of non-disruptive, political student speech in public schools as long as the speech restrictions are viewpoint or content-neutral. That holding is unprecedented in this Court's student speech jurisprudence; it effectively overrules a landmark decision of the Court; and it needlessly interferes with the exercise of core First Amendment freedoms in our Nation's public schools. The decision thus warrants this Court's review.

In opposing certiorari, respondents primarily urge that a different standard—traditionally used by the Court in analyzing First Amendment challenges to restrictions on conduct, such as nude dancing and draft-card burning—should apply in evaluating the constitutionality of content- or viewpoint-neutral restrictions on student speech. Opp. 11-12. That view, however, merely confirms the importance of the issue and the need for review by this Court. The scope of *Tinker*'s application to restrictions on student speech is a matter for this Court alone. See, e.g., *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

A. This Court's Review Is Warranted To Resolve The Entrenched Circuit Split Concerning The Scope of *Tinker*

The Fifth Circuit, like the Sixth and Ninth Circuits, held that *Tinker* does not apply to viewpoint- or content-neutral restrictions on student speech. Pet. App. 12; *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008) ("*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny."); *M.A.L.* v. *Kinsland*, 543 F.3d 841, 850 (6th Cir. 2008) (schools "need not satisfy" the *Tinker* standard of scrutiny "to impose a viewpoint-neutral regulation" of student speech.). Those decisions directly conflict with the Second, Third, and Fourth Circuits' application of *Tinker* as a general rule to all speech restrictions. See *Guiles* v. *Marineau*, 461 F.3d 320, 321 (2d Cir. 2006) ("*Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar"); *Saxe* v. *State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (student speech "falling outside" of the narrow categories of speech recognized by this Court "is subject to *Tinker*'s general rule"); *Newsom* v. *Albermarle County Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003) (applying *Tinker* to a viewpoint-neutral regulation prohibiting all "messages on clothing" relating to weapons).

Respondent does not dispute that in the Second, Third, and Fourth Circuits, schools cannot constitutionally prohibit public-school students from

expressing non-disruptive, political messages on shirts. Nor does respondent dispute that, in the Fifth, Sixth, and Ninth Circuits, schools can do precisely that. There is a clear, longstanding 3-3 circuit split on the question of what standard applies to restrictions on student speech. See Frank D. LoMonte, *Shrinking* Tinker*: Students are "Persons" Under our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1328 (2009) ("Most courts continue to recognize *Tinker* as supplying the default standard under which regulation of student expression is to be judged unless the facts fit one of the relatively narrow exceptions carved out by the Supreme Court. At least three U.S. circuit courts of appeal, however, have indicated that they will require the government to satisfy the *Tinker* standard only in the relatively rare instance when a regulation discriminates based on the speaker's viewpoint."). Respondent does not seriously dispute the merits of that split.

Instead, respondent attempts to avoid it by arguing that the Second and Third Circuits' decisions in *Guiles* and *Saxe* were really just about viewpoint discrimination (and thus indisputably governed by *Tinker*). But that argument does not withstand scrutiny. In *Guiles*, the Second Circuit carefully analyzed whether *Tinker* is limited to viewpoint-based discrimination, but ultimately concluded that *Tinker* supplies the "general rule" for student-speech cases. 461 F.3d at 326 (explaining that this Court "considers the rule of *Tinker* to be *generally applicable to student-speech cases*" and announcing that it would "[p]roceed

according to the understanding that *Tinker* applies to *all* non-school-sponsored student speech that is not lewd or otherwise vulgar") (emphasis added); *id.* at 327. There would have been no need for that analysis under respondent's narrow view.

Indeed, the *Guiles* court "pause[d] to acknowledge some lack of clarity in the Supreme Court's student-speech cases" and noted "[i]t is not entirely clear whether *Tinker*'s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination." *Id.* at 326. That is precisely the conflict that merits this Court's review. And the Second Circuit's explicit acknowledgement of the confusion and uncertainty underscores the need for this Court's intervention.[1]

In *Saxe*, the Third Circuit made clear, after surveying this Court's student-speech cases, that student speech "falling outside" the recognized exceptions to *Tinker* "is subject to *Tinker*'s general rule: it may be

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[1] Respondent's contention that Justice Alito's concurrence in *Morse* v. *Frederick* "does not further petitioner's argument" (Opp. 18) misses the point. Justice Alito, joined by Justice Kennedy, stated he did "not read the [majority] opinion to mean that there are necessarily *any* grounds for such regulation that are not already recognized in the holdings *of this Court*." *Morse*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (emphasis added). As this Court has never applied intermediate scrutiny—as the court did below—to regulations restricting student speech, this case presents precisely the issue raised in Justice Alito's concurrence.

regulated only if it would substantially disrupt school operations or interfere with the right of others." 240 F.3d at 214. The court went on to hold that because the policy at issue restricted "non-vulgar, non-sponsored student speech," the school "must therefore satisfy the *Tinker* test * * * * * " *Id.* at 216. Respondent's argument that the Third Circuit applied *Tinker* merely because viewpoint discrimination was involved cannot be squared with the Third Circuit's own analysis.

Although respondent insists that *Tinker* applies solely to viewpoint-based restrictions (Opp. 11-17), respondent cites no statements in *Tinker* itself or any other decision of this Court saying so—and for good reason, because there are none. To the contrary, *Tinker* itself confirms that it is not limited to cases of viewpoint discrimination.[2] In all events, respondent's

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[2] As the *Tinker* Court explained, "[i]f a regulation were adopted by school officials [1] *forbidding discussion of the Vietnam conflict, or* [2] *the expression by any student of opposition to it* anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students" absent a reasonable forecast of disruption. 393 U.S. at 513 (emphasis added). The first example is a content-based restriction. The second is viewpoint-based. Both restrictions, the Court stated, are "obvious" examples of censorship that violate the First Amendment absent a reasonable forecast of disruption. After all, the ban in *Tinker* applied to all armbands—not just ones opposing the war. *Id.* at 504 ("[*A*]*ny* student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.") (emphasis added).

merits-based argument concerning the reach of *Tinker* only confirms the importance of the issue and the necessity of this Court's review to resolve the entrenched 3-3 split.[3]

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[3] Respondent attempts to distinguish the Fourth Circuit's decision in *Newsom* by arguing that the court was not confronted with a "content-neutral" speech regulation. Opp. 16. But if, as respondent contends, *Tinker* applies only to viewpoint-based regulations, then the Fourth Circuit should not have applied *Tinker* in *Newsom*, because the speech restriction struck down in that case was viewpoint-neutral. See 354 F.3d at 252.

Moreover, petitioner's position is that the speech regulation here is not content-neutral, either. Pet. 9 (citing Pet. App. 12-13). A speech regulation banning the First Amendment or "Edwards 08" on a shirt but allowing "Go Indians" (the school mascot) or "Waxahachie Debate Club" is content-based. Respondent suggests (and the court below agreed) that, because "McCain 08" is also prohibited, the restriction is somehow content-neutral. Opp. 23. That argument confuses content neutrality with viewpoint neutrality. A speech regulation that allowed "McCain 08," but prohibited "Edwards 08," would be viewpoint-based and indisputably unconstitutional even under respondent's theory. Although a restriction that prohibits both is viewpoint-neutral, it is not content-neutral. *Boos* v. *Barry*, 485 U.S. 312, 319 (1988); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 477 U.S. 530, 537 (1980). A restriction prohibiting all political speech on shirts, while allowing other forms of favored speech, is the very definition of a content-based restriction. But no matter how the speech restriction at issue here is categorized, this case presents an ideal vehicle to resolve the conflict as to whether *Tinker* applies to all restrictions on student speech, or only to viewpoint-based restrictions.

B. This Case Is An Ideal Vehicle For Resolving The Split

This case presents an optimal vehicle for resolving the conflict and clarifying the limits on student-speech restrictions. There are no disputed fact issues. Respondent has conceded, as the Fifth Circuit recognized (Pet. App. 7-8), that the political message petitioner sought to express was not disruptive; not lewd, vulgar, or obscene; not school-sponsored; and did not advocate the use of drugs, alcohol, or any other activity harmful to young people. This case thus squarely presents the purely legal issue that has divided the circuits. Resolution of that issue will determine the outcome of this case, as the Fifth Circuit acknowledged. *Ibid.* (acknowledging that under *Tinker* petitioner "would prevail" on his free-speech claim).

Contrary to respondent's assertions (Opp. 17), the interlocutory nature of the court of appeals' erroneous decision, in the circumstances presented here, supports immediate review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 259 (8th ed. 2002).

There is no possibility that proceedings in the lower court may obviate the need for the Court's intervention. The district court—which has already

stated that the issue presented by the petition is dispositive and should be decided by this Court (Pet. App. 27)—has entered a stay pending this Court's disposition of the petition. Dkt. #54. And the court of appeals' resolution of the legal issues renders the final judgment in this case all but a foregone conclusion.

The prudential considerations in this case weigh heavily in favor of immediate review. The issue presented warrants this Court's review for the reasons set forth in the petition: (1) the divided courts of appeals' resolution of that issue is inconsistent with the decisions of this Court and other courts of appeals (Pet. 3), and (2) the issue presents a vitally important and recurring question of constitutional law. *Id.* at 13. If left in place, the erroneous court of appeals ruling would provide misleading guidance and force the district court to issue a final judgment based on fundamentally mistaken principles of law. Given the fact that the court of appeals' erroneous decision has widened an already entrenched conflict among the courts of appeals, this Court should review the court of appeals' decision now.

C. The Scope Of Student Speech Rights Under *Tinker* Is An Important Issue Warranting This Court's Review

Respondent does not dispute that the scope of student speech rights under *Tinker* is an exceptionally important, recurring issue of constitutional

magnitude. Indeed, it is an issue that affects nearly 50 million public school students, their parents, and school officials across the Nation. See U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, 2008 (NCES 2009020). This Court's review is needed now to resolve the pervasive confusion about the scope of student speech rights—uncertainty that can only spawn more litigation (and put constitutional freedoms at risk) as long as it persists.

Respondent errs in attempting to downplay the need for this Court's review by suggesting that the decision below is limited to "dress codes." Opp. 17. It is not. Pet. App. 12. Any doubt on that score was removed by the Fifth Circuit's recent rejection of *Tinker* in reviewing—and upholding—restrictions on literature distribution by public-school students under the same standard applied in the instant case. *Morgan* v. *Plano Indep. Sch. Dist.*, No. 08-40707, 2009 WL 4265219, at *1 (5th Cir. Dec. 1, 2009).

At the same time, respondent exaggerates both the scope of petitioner's as-applied challenge and the consequences of a ruling in his favor. See Opp. 17-18. For example, respondent opines that all dress codes restricting speech are doomed under *Tinker*. Opp. 23. That is not so. See, e.g., *Barr* v. *Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (holding that ban on wearing the Confederate flag was justified under *Tinker*) (quoting *Tinker*, 393 U.S. at 511), cert. denied, 130 S. Ct. 63 (2009). *Tinker* itself was a "dress code" case, involving a prohibition against wearing armbands. Thus, to the

extent logos and messages on clothing are distracting, *Tinker* permits schools to ban them. 393 U.S. at 514. And schools may categorically ban *all* student speech that is "vulgar," "lewd," "indecent," or "plainly offensive." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 677-79 (1986). Petitioner agrees that *Tinker* should not be used to evade otherwise rational and legitimate dress codes and uniform policies. But neither should schools be permitted to use their authority to impose such codes as cover for denying students free-speech rights otherwise guaranteed by *Tinker*, *Fraser*, *Hazelwood*,[4] and *Morse*.

Respondent's concern that a ruling in petitioner's favor will result in students enjoying greater free speech rights than adults (Opp. 17-18) is misplaced. A significant amount of speech properly may be banned in public schools under *Tinker*, *Fraser*, *Hazelwood*, and *Morse* that could not be justified outside the school context. See, e.g., *Fraser* at 682 (noting that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket") (internal quotation marks and citation omitted). Respondent's invocation of forum analysis is inapposite, because students are not seeking access to government property—they are compelled by government itself to be there. See *Morse*, 551 U.S. at 424 (Alito, J., concurring). And reasonable time, place, and manner regulations are perfectly consistent with *Tinker*. 393 U.S. at 513.

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[4] *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260 (1988).

It is the Fifth Circuit's approach—not petitioner's—that raises serious concerns. The approach adopted by the Fifth Circuit is "potentially especially hostile to the speech that is constitutionally most important," because if "schools can presumptively suppress all student speech and permit only what they explicitly approve, controversial political speech has little chance for approval, and religious speech may have even less chance." Br. of *Amici* Cato Institute, *et al.*, 22-23.[5]

Perhaps recognizing as much, respondent attempts to narrow its speech restriction to the school day only. Opp. 25. But the policy is not so limited, and applies to all school events at all times on school grounds, including after-school events such as football games. It is thus against school policy for a student—old enough to serve in the military, to vote, and to be charged with a crime as an adult—to wear a shirt to a football game expressing his or her preference for President of the United States or allegiance to the Constitution—the very speech that "the First Amendment was designed to protect," *Morse*, 551 U.S. at 403.

But the school policy allows that student to wear a shirt emblazoned with whatever message the school

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[5] Respondent misunderstands petitioner's argument regarding a total ban on all words in the context of *O'Brien*. See Opp. 26. Petitioner's position is that under *O'Brien*, the school's policy of indiscriminately allowing buttons and bumper stickers on shirts—with no restrictions whatsoever on size or number—negates any state interest in banning political speech neatly and professionally printed on shirts.

deems to "promote the school district and its instructional programs" (Pet. App. 30-31). That is precisely the sort of restriction singled out by Justice Alito in *Morse* as raising particular constitutional concern. See 551 U.S. at 422 (Alito, J., concurring).

If, under *Tinker*, the First Amendment requires that public schools students be permitted to wear armbands opposing the war, it is difficult to understand how public school students may be prohibited from wearing shirts that support the troops—or a presidential candidate, or the First Amendment itself.

* * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici in cases involving constitutional issues, with a particular emphasis on the First Amendment. In particular, Counsel of Record for amicus has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).[2] Proper resolution of this case is of significant interest to the ACLJ as it will determine the degree of protection afforded to a vast number of public school students in the exercise of their First Amendment right to freedom of speech.

The ACLJ is committed to protect the free speech rights of individuals, including public school students. While public school officials undoubtedly maintain the authority to act in furtherance of the discipline and protection of students during the

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to the filing of this brief. Copies of the parties' written consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See also McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

school day, it is vitally important that school boards, as arms of the government, not be allowed selectively to silence our nation's youth by enacting policies that discriminatorily restrict student speech on school campuses. Policies that suppress private student messages merely because they have not received approval from school officials strike at the core of the First Amendment. It is essential that lower courts understand and apply the proper constitutional standard when assessing the government's attempts to limit the free speech rights of public school students. Because the decision below sharply departs from the settled precedent of this Court, and thus seriously unsettles the clarity of the law, this Court should grant review.

SUMMARY OF ARGUMENT

This Court enunciated the rule for analyzing the constitutionality of restrictions on the free speech rights of public school students in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). In the forty years since this decision, this Court has continued to recognize *Tinker* as the governing standard in student speech cases. In particular, not once during that time has the Court applied the different—and lower—standard for restrictions on expressive *conduct* announced in *United States v. O'Brien*, 391 U.S. 367 (1968), to government regulations of pure speech in the public school setting. The application of the *O'Brien* test by the Fifth Circuit here is therefore a clear departure from, and in direct conflict with, this Court's decisions. This Court should grant the petition for

certiorari to correct the Fifth Circuit's erroneous invocation of the *O'Brien* test to analyze a restriction on pure student speech that is properly governed by the standard enunciated in *Tinker*.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioner has focused this Court on a split among the circuits as the basis for a grant of certiorari. Amicus wishes to highlight the Fifth Circuit's blatant departure from this Court's relevant decisions as an additional reason the Court should grant the petition.

This Court has held that restrictions on student speech are governed by the *Tinker* standard—which provides that a public school may not silence pure student speech that does not materially and substantially disrupt the proper discipline and functioning of the school—not the *O'Brien* test. Thus, *Tinker*, not *O'Brien*, sets the constitutional standard for the Waxahachie Independent School District's policy prohibiting students from expressing written political, religious, and other personal messages on their clothing. Both the terms of the *O'Brien* test and this Court's precedents make clear that application of *O'Brien* is inappropriate in the context of regulations of pure speech of public school students.

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSISTENTLY HAVE RECOGNIZED THE *TINKER* STANDARD AS THE GENERAL RULE APPLICABLE TO RESTRICTIONS OF PURE SPEECH IN THE PUBLIC SCHOOL SETTING.

This Court has applied the *O'Brien* test to expressive *conduct* since its inception in 1968. When faced with government regulations of *pure speech by public school students*, however, the Court has never utilized the *O'Brien* test. Rather, this Court has consistently employed the *Tinker* standard.

Just two terms after issuing the decision in *O'Brien*, this Court decided a case involving a restriction on student expression in a public school. In *Tinker v. Des Moines Independent School District*, the Court addressed the constitutionality of a school regulation prohibiting students from expressing their political views through their clothing. The students penalized under the policy had worn armbands for the express purpose of protesting hostilities in Vietnam. *Id.* at 504. Importantly, the Court did *not* apply the test it had recently established in *O'Brien*. Instead, the Court described the students' expressive activity as "closely akin to 'pure speech,'" *id.* at 505 (and thus, as explained *infra*, beyond the purview of *O'Brien*). Citing "the special characteristics of the school environment," 393 U.S. at 506, the Court held that "in the area where students in the exercise of their First Amendment rights collide with the rules of the

school authorities," *id.* at 507, a student "may express his opinions, even on controversial subjects . . ., if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The *Tinker* Court thus made clear that the starting point for analysis of student speech regulations is exactly the opposite of the starting point under *O'Brien*. Instead of asking whether conduct not otherwise within the parameters of free speech is nonetheless deserving of constitutional protection by virtue of its expressive nature (as *O'Brien* inquires), the question under *Tinker* is whether private student speech, which is presumptively safeguarded against government infringement by the Free Speech Clause of the First Amendment, is sufficiently disruptive of the proper functioning of the government (school) to fall outside that protection.

The Court's position was clear: the "special characteristics" of the public school setting give rise not only to unique and important governmental interests but also to the need for "vigilant protection of constitutional freedoms," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), such that regulation of the free speech rights of students is to be scrutinized under a more demanding rule—the *Tinker* standard—rather than "*O'Brien*'s relatively lenient standard." *Texas v. Johnson*, 491 U.S. at 407.

The Court next addressed a restriction of student speech in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), involving a school's discipline of a

student based on a speech he delivered to a school-wide audience. While the *Fraser* Court rejected the student's First Amendment challenge, it expressly reaffirmed *Tinker*'s holding that public school students retain their free speech rights even while on campus. *Id.* at 680. According to the Court, the result in favor of the school was warranted by the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case . . . ." *Id.* Again, as in *Tinker*, the Court did *not* apply *O'Brien*.

Two years after the *Fraser* decision, the Court again faced a First Amendment challenge to a school's regulation of student speech. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the school principal directed a faculty adviser to withhold two student-written articles from publication in the school newspaper. The students filed suit alleging violation of their free speech rights. While the Court ruled that *Kuhlmeier* involved student speech occurring entirely within the confines of a school-sponsored, curricular setting, and thus turned on a question entirely distinguishable from that in *Tinker*, the *Kuhlmeier* Court, like the *Fraser* Court before it, reaffirmed the applicability of the *Tinker* standard to pure speech by public school students.

The *Kuhlmeier* Court characterized the issue in *Tinker* —pure student speech resulting solely from the student's decision to communicate his own message—as involving "[t]he question whether the First Amendment requires a school to *tolerate* particular student speech," *Id.* at 270 (emphasis added). Put another way, this "question addresses

educators' ability to *silence* a student's personal expression that happens to occur on the school premises." *Id.* at 271 (emphasis added). Thus, the Court continued to recognize "the standard articulated in *Tinker*"—not the *O'Brien* test—as the general rule "for determining when a school may punish student expression," *id.* at 272, initiated not for curricular or other official school purposes but solely for purposes of interpersonal communication.

Most recently, this Court addressed the validity, under the First Amendment, of a school's decision to punish or restrict student speech in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Morse*, the Court confronted a First Amendment challenge to a principal's decision to suspend a student for displaying, at a school-supervised event, a banner appearing to advocate illegal drug use. Just like the *Fraser* and *Kuhlmeier* Courts, the *Morse* Court began by reaffirming *Tinker*'s holding that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506). The Court simply explained that the *Tinker* rule is not "absolute," *id.* at 2627, when, "in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506, student speech implicates "serious and palpable" dangers. *Morse*, 127 S. Ct. at 2629. As in *Fraser*, the *Morse* Court concluded that the proper functioning of the school (there, protecting students through its policy prohibiting advocacy of illegal drug use) outweighed the student's right to engage in his choice of personal expression on the school campus (there, speech appearing to advocate illegal

drug use). Notably, as in *Tinker*, *Fraser*, and *Kuhlmeier*, the Court did *not* apply the *O'Brien* test.

Taken together, this Court's student speech cases consistently have recognized that the general rule applicable to a restriction of student speech on the public school campus is *Tinker*'s "material and substantial interference" test, which requires a school, when attempting to "alter[] the usual free speech rights" of public school students, *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring), to identify a concrete danger to "some special characteristic of the school setting," *id.*, that would justify the restriction. In other words, when a school's challenged policy "does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment," *Tinker*, 393 U.S. at 507-08, but instead "involves direct, primary First Amendment rights akin to 'pure speech[,]'" *id.*, such as the wearing of armbands or a choice among messages incorporated into clothing, a heightened standard of scrutiny is required to afford adequate protection to students' speech rights.

The application of *O'Brien* by the Fifth Circuit here thus sharply departs from this Court's instructions in *Tinker* and fails to strike the appropriate balance between the school's legitimate interests in order and discipline and the constitutional freedoms to which public school students are entitled. Because the decision below departs from this Court's precedents on the governing constitutional standard, this decision exerts a profoundly unsettling effect upon the law. This Court should therefore grant review.

B. THE DECISION BELOW MARKS A DEPARTURE FROM THIS COURT'S DECISIONS WHICH CLARIFY THAT THE PURPOSE OF THE *O'BRIEN* TEST IS TO ANALYZE RESTRICTIONS IMPOSED ON EXPRESSIVE CONDUCT, NOT PURE SPEECH.

As the Court enunciated the standard in *O'Brien*, "when 'speech' and 'nonspeech' elements are combined in the same course of *conduct*, a sufficiently important governmental interest in regulating the *nonspeech* element can justify *incidental* limitations on First Amendment freedoms." 391 U.S. at 376 (emphasis added). By its own terms, the *O'Brien* test is intended only for application to physical *conduct*—like burning a flag or draft card—that is intended to express an idea. Further, *O'Brien* applies only when any restrictions on First Amendment freedoms—such as the exercise of "pure speech"—are *incidental*. Thus, the *O'Brien* test is relevant for determining whether activity not otherwise constitutionally protected should nevertheless be afforded protection under the First Amendment because of its expressive nature. It is entirely inapposite where, as here, pure speech—the written or spoken word—is the intended target of the regulation.

This Court first announced the *O'Brien* test in 1968 in the context of the destruction of a selective service registration certificate. *O'Brien*, 391 U.S. 367. The Court distinguished between "speech," on the one hand, which enjoys full protection under the First Amendment, and "conduct intend[ed] . . . to

express an idea," *id.*, which enjoys such protection only when it is restricted *because of* its expressive nature, and the government fails to demonstrate that the restriction serves a sufficiently important interest. Applying this standard to O'Brien's conduct, the Court held that the government's interests in prohibiting the "independent noncommunicative" element—destruction of the draft card—was sufficient to outweigh any *incidental* restriction on the exercise of O'Brien's First Amendment rights—the communication of his anti-war message. *Id.* at 382. Subsequent decisions of this Court have likewise recognized that *O'Brien* applies to *conduct*, as distinguished from pure speech. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006); *McConnell v. FEC*, 540 U.S. 93, 250 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001).

By contrast, the instant case centers on a school district's *direct* regulation of the written word, a means of communication this Court has labeled "pure speech," which falls squarely within the protections of the First Amendment. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing distinction between "speech," which clearly encompasses dissemination of the "written word," and "conduct," which is "intend[ed] . . . to express an idea"); *Tinker*, 393 U.S. at 505-06 ("'pure speech' . . ., we have repeatedly held, is entitled to comprehensive protection under the First Amendment") (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966)).

This Court has expressly acknowledged that "[t]he government generally has a freer hand in restricting

expressive conduct than it has in restricting *the written* or spoken *word*." *Johnson*, 491 U.S. at 406 (emphasis added). Because this Court has "limited *O'Brien*'s relatively lenient standard" to "regulations of noncommunicative *conduct*," that are "unrelated to the suppression of free expression," *id.* at 403, 407 (emphasis added) (quoting *O'Brien*, 391 U.S. at 377), its application by the Fifth Circuit to a school policy restricting pure student speech marks a sharp departure from this Court's relevant decisions.

CONCLUSION

Because the decision below departs from and conflicts with controlling precedent from this Court, the Court should grant the petition for certiorari.

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No. 09-409

In the

Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,
Petitioners,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF CHARLES BARUCH AND WALKER BATEMAN IV,

in support of the *Petitioners*.

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INTEREST OF *AMICI CURIAE*[1]

Walker Bateman IV is a former public school board member in the Highland Park Independent School District in Highland Park, Texas. Located in north Dallas, HPISD includes four elementary schools, one middle school, and one high school with a student population of approximately 1,900 students. HPISD's total student enrollment for the 2009-2010 school year is approximately 6,432.

Charles "Chad" Baruch is a high school administrator at Yavneh Academy of Dallas, a private school in Dallas, Texas. He previously served as a teacher or coach in large public high schools in South Dakota, Minnesota, and Wisconsin.

Mr. Bateman and Mr. Baruch are deeply concerned about the constitutional and educational implications of the Fifth Circuit's decision. They are particularly worried that the public education community, hesitant to oppose one of its own members and adopting a "circle the wagons" mentality, may not completely or accurately explain those implications to this Court. Mr. Bateman and

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[1] The parties have consented to the filing of this Brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

Mr. Baruch tender this Brief solely to help this Court understand the issues presented in this case, attempting to offer the perspective of high school administrators working "in the trenches" of American public education.[2]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Forty years ago, this Court struck exactly the right balance between the need for administrators to maintain order in America's public schools and the need for young Americans to learn to function as citizens in a vibrant democracy by exercising their First Amendment liberties. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court made clear to administrators and students alike that:

- political speech does not lose its constitutional protection simply because it is exercised by a student attending—often under threat of criminal sanction for non-attendance—one of America's public schools, but that
- students may not rely on the First Amendment to disrupt the educational process or infringe on the rights of their classmates.

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[2] Although Mr. Bateman and Mr. Baruch are not themselves administrators in the public schools, their combined experiences within the public and private school systems have afforded them insight into the unique problems associated with handling matters of student speech and dress.

Tinker was to student expression and political participation what *Brown v. Board of Education*, 347 U.S. 483 (1954), was to student equal-opportunity. It reaffirmed that a core value of the Constitution does not cease to exist in America's public schools.

By this Brief, Mr. Bateman and Mr. Baruch make three arguments in support of Paul "Pete" Palmer's Petition for Writ of *Certiorari*. First, the federal case law governing student expression—especially student dress—is hopelessly confused and varies among circuits. If this Court does not address this circuit split, high school principals and students will continue to suffer from a lack of clear guidance and needless litigation will result. Second, *Tinker* provides a straightforward standard easily understood by high school principals (who deal every day with preventing school disruption, but likely lack experience with content-neutrality) and permits principals all the leeway necessary to maintain school order. *Tinker* is the only possible standard that grants principals that leeway while still respecting the constitutional rights afforded to students—and respecting the important role that America's public schools play in preparing students to function as informed citizens in our democratic system. Third and finally, the Waxahachie School District's (the "School District") policy is not content-neutral because it permits government-sanctioned messages while barring all non-sanctioned messages.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND UNIFY THE FEDERAL CASE LAW CONCERNING STUDENT SPEECH RIGHTS, ESPECIALLY WITH REGARD TO STUDENT DRESS.

For many years, high school administrators and students assumed that the *Tinker* standard governed all student speech (other than speech covered by the narrow exceptions carved out in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), or more recently *Morse v. Frederick*, 127 S. Ct. 2618 (2007)). Over the past decade, that certainty has given way to growing confusion. The recent circuit split deepened that confusion and left students in different parts of the country subject to different court-created standards. (*See* Pet. for Writ of Cert. at 19-22.) The time has come for this Court to consider this issue and make uniform the principles governing it.

The confusion for many principals is aggravated because they lack significant legal training. Illustrating this fact, one popular legal guidebook for principals contains a question-and-answer format, providing direct answers to most legal questions a principal might confront. It does not, however, directly answer the question of "How does a court determine if a student's choice of dress is constitutionally protected?" Charles C. Haynes, *et*

al., *The First Amendment in Schools* 77-78 (2003). Instead, the book's answer would confuse most experienced lawyers, much less high school principals. The book notes that different courts apply different standards, including both those from *Tinker* and *United States v. O'Brien*, 391 U.S. 367 (1968), and leaves the reader (legally-trained or otherwise) without much guidance on which standard any particular court might apply. *Id.* Another guidebook is more blunt, stating that "intermediate appellate courts differ over First Amendment protection for t-shirts, and this area of the law remains unsettled." *The Constitution at School: A Guide for Public High School Principals on the Constitutional Rights of Students on Campus* 9 (Texas Young Lawyers Ass'n ed., 2009).

If this Court does not resolve the circuit split and make the standard governing this issue clear and uniform, principals and students will continue to differ over the permissibility of limitations on student expression, and school districts will continue to face needless lawsuits.

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *TINKER* CONTROLS STUDENT SPEECH CASES BECAUSE IT PROVIDES A STRAIGHTFORWARD STANDARD FOR SCHOOL PRINCIPALS TO USE.

A. The *Tinker* standard is easily understood and applied by school principals.

Tinker provides a standard uniquely well-suited for principals to properly administer matters of student speech and dress. Most American public school principals lack understanding of or experience with the intricacies of *content-neutrality* or *least-restrictive means*. But they understand disruption. They *live* disruption. The average American principal can easily forecast the likelihood of a particular act or event causing substantial and material disruption. That is a call principals are asked to make time and again in the exercise of their duties. *Tinker's* simplicity and applicability can be simply illustrated. Following the Fifth Circuit's decision in this case, a Texas newspaper interviewed a suburban Dallas principal for comment. The principal responded that his school would only "forbid a campaign t-shirt if it would cause a disruption in the class." Amanda Casanova, *Student Takes Dress Code to Court*, Abilene Reporter News, July 8, 2009.[3] In other words, without identifying it,

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[3]Available at: http://www.reporternews.com/news/2009/jul/08/dress-code-hedline-in-here/ (last viewed on November 2, 2009).

the principal instinctively articulated the *Tinker* standard.

Tinker also affords principals ample leeway to maintain school order. *Tinker* permits school administrators to control student speech only when the speech "materially and substantially disrupt[s] the work and discipline of the school," meaning it will "materially disrupt classwork" or cause "substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.[4]

With the exception of lewd, obscene, or school-sponsored speech, or speech that advocates illegal drug use, a school has no legitimate reason for censoring student speech. *Tinker* permits principals to address these situations, vesting them with unfettered power to stifle *all* student expression—from sexually-provocative clothing to gang-related apparel—likely to interfere materially with the educational process. Any greater power fails to serve a legitimate educational purpose.

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[4] Although the phrase "invasion of the rights of others" has been used differently at times by various Courts of Appeals, *see e.g. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), and *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), its application here is unnecessary—the political speech at issue here can easily be evaluated in terms of material and substantial disruption, with no separate implication of the rights of others.

B. *Tinker* Allows for Proper Maintenance of Order within the School While Still Respecting the Constitutional Rights of the Students.

America's public schools are charged with preparing young Americans to live and participate in a liberal democracy. Indeed, this Court "has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 131 (1995). One important aspect of this mission is inculcating in students an understanding of and appreciation for the principles of the Constitution.

When a school stifles speech—especially speech that does not even arguably impede the school's educational mission—it is antithetical to teaching the value of free expression. This constitutional socialization requires scrupulous protection of student free expression "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

The School District should be one of the most outspoken advocates of preparing students to participate in the civic arena. Many in school administrative roles understand and appreciate that preparation. In September 2004, the National Association of Secondary School Principals, a professional organization comprised of more than

30,000 middle and high school administrators, devoted an entire issue of its national magazine, *Principal Leadership*, to the topic of "Making Civics Real." According to one article in that issue:

> Creating informed, engaged citizens who are knowledgeable voters and active participants in both the democratic process and their communities may be *our single-most important mission as educators.*

Kathryn A. Agard, *Learning to Give*, Principal Leadership, Sept. 2004, at 43, 46 (emphasis added).

Education—or at least effective education—is not something that the school does *to* the student. Rather, education involves an interactive process revolving around a free exchange of ideas. The communication and probing of dissenting opinions is a critical part of the educational process in this country. And this free exchange of ideas should not be limited to the classroom—it should take place in the cafeteria, the commons, the library, and the locker room.

Pete Palmer's t-shirt did not hinder the educational process. Under better tutelage, it would have aided that process. It presented a unique opportunity for a social studies discussion about anything from the presidential election, to the importance of voting and participation in the political processes, to the history of political dissent, to this Court's decision in *Tinker*. Rather than embrace this opportunity to engage its students, the

School District chose instead to stifle the speech. Lock-step adherence to a restrictive policy of censorship trumped education. As this Court has cautioned, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

Disagreement is a fundamental part of the democratic process at every level. It is an essential part of the public school's mission to prepare students to participate in the political process, including to listen to and evaluate other ideas and respond to them forcefully but civilly. Stifling student speech without cause undercuts this goal and leaves students unprepared to participate in our nation's political system.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SCHOOL DISTRICT'S DRESS CODE IS NOT CONTENT-NEUTRAL.

The School District's dress code policy (the "Policy") is particularly troubling given its differentiation between speech sanctioned by the government and all other speech. Almost from its beginning, the Policy makes clear its foundation in permitting speech selectively based on content. The Policy forbids any words or symbols on student clothing "except those that promote the school district and its educational programs" (Pet. for Writ of Cert. at App. 30-31.) Thus, students are free, for

example, to wear lettering promoting elected school board officials—but not criticizing them. They may wear clothing supporting the football team—but not criticizing it (or criticizing the district for spending more money on football than debate).

Even more troubling in the Policy is the practice of permitting only "principal-approved" t-shirts from district-sponsored activities. (Pet. for Writ of Cert. at App. 30-31.) Again, for example, if the student council (a school-sponsored organization) wished to print t-shirts supporting an increase in the budget for English textbooks at the expense of athletics, its members could not wear those t-shirts to school without the approval of the principal. In this context, the phrase *principal-approved* is an artful way of saying *government-sanctioned.*

The notion of protecting speech based on sanction by the government should send chills up the spine of anyone concerned about the specter of governmental intrusion into matters of conscience. *Tinker* expressly and appropriately rejected this type of message-control by stating that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. As Justice Jackson so famously put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . . ." *Barnette*, 319 U.S. at 642.

CONCLUSION

The Fifth Circuit's decision grants authority to principals far exceeding the power necessary to maintain school order. Instead, the Fifth Circuit has provided principals with infinitely-elastic power to stifle student expression in violation of the First Amendment. Judicial deference to educators is important, but not at the expense of the Constitution. School administrators are asked to perform a daunting arrays of tasks, but "none that they may not perform within the Bill of Rights." *Barnette*, 319 U.S. at 637.

Mary Beth Tinker had her armband; Pete Palmer has his t-shirt. Neither of them disrupted or interfered with the educational process, and both of them evinced *precisely* the type of political awareness and involvement we profess to seek from our young people.

This Court should grant the Writ of *Certiorari* to reaffirm the balance between maintaining school order and protecting the student constitutional rights necessary to ensure a generation prepared to lead this nation into the middle of the twenty-first century.

Respectfully submitted,
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IN THE
Supreme Court of the United States

PAUL T. PALMER, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, PAUL D. PALMER AND DR. SUSAN GONZALEZ BAKER,

PETITIONER,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

RESPONDENT.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CATO INSTITUTE, INSTITUTE FOR JUSTICE, BECKET FUND FOR RELIGIOUS LIBERTY, CHRISTIAN LEGAL SOCIETY, AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI*[1]

The amici joining in this brief are not-for-profit organizations committed to protecting essential liberties of the American people. More detailed statements describing each amicus are set forth in an Appendix.

SUMMARY OF THE ARGUMENT

Just under 50 million Americans attend public schools.[2] Nearly 16 million of them are enrolled in the nation's high schools. Only a little more than half of those students will attend college, and many of those will not attend college for long. Thus, the majority of the civic training of the country's young adults, many of whom will vote and establish their own households shortly upon graduating, occurs in the public schools.

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that this critical population enjoys First Amendment rights, and that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of *Amici Curiae* to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] Maria Gold, *A Changing Student Body*, WASH. POST (June 1, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102229.html.

educational process. Over the ensuing forty years, this Court has repeatedly reaffirmed this central holding of *Tinker*, which protects nondisruptive, respectful dialogue in the public schools on issues of public concern. Such speech is critical to the development of a civil society. Nevertheless, the Fifth Circuit's decision in this case effectively empowers school administrators to quash this speech.

The Fifth Circuit's decision threatens to eliminate whatever student-speech protections *Tinker* assures by uniting two Fifth Circuit precedents. First, the Fifth Circuit held that content-neutral speech regulation is an independent exception to *Tinker*, relieving school officials of any obligation to permit nondisruptive political or religious speech or to tailor prohibitions on speech in any meaningful way. Second, the Fifth Circuit adopted a definition of content neutrality that allows schools to overtly distinguish between different categories of speech—to undertake content-based and even viewpoint-based regulation—yet still enjoy the relaxed scrutiny extended to content-neutral regulation. To this combination, the Fifth Circuit added an extraordinarily deferential standard of review. The combined effect of the two precedents and the standard of review is that schools enjoy virtually unlimited discretion to restrict student speech.

Both Fifth Circuit precedents are contrary to the precedent of this Court. Without this Court's resolution of these issues, it is highly likely that important political and religious speech will bear much of the brunt of the discrimination, because it often represents the most controversial and

challenging speech that school administrators encounter and seek to avoid. Review is therefore essential to clarify and confirm the most basic rights of students.

ARGUMENT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The First Amendment Forbids Suppression of Nondisruptive Political and Religious Student Speech.

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that students in public schools enjoy First Amendment rights. 393 U.S. 503, 511 (1969). As the Court poignantly observed in a statement that has been reaffirmed by a host of subsequent decisions: public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Fifth Circuit's decision in this matter undermines *Tinker* at its foundation. At the very least, the decision below presents a fundamental question about the meaning of a landmark decision of this Court. Review is essential, therefore, to clarify and enforce *Tinker* and to reaffirm the most basic rights of this nation's students.

B. This Court's First Amendment Jurisprudence Protects Students' Right to Speak While Attending School.

In *Tinker*, school officials attempted to thwart a plan by high school students to wear black arm bands to school in protest of the Vietnam War by preemptively adopting a policy prohibiting all armbands. *Id.* at 504. The students nonetheless wore the armbands, and were subsequently suspended for violating the policy. *Id.* The students' motivation originated in Social-Gospel Methodism and Quaker beliefs. Mary Beth Tinker, *Reflections on Tinker*, 58 AM. U. L. REV. 1119, 1120, 1123 (2009). The students sued, contending that the suspension violated their constitutional rights to free speech and expression, and this Court agreed. *Tinker*, 393 U.S. at 504.

The Court held that student speech—at least the core political speech engaged in by the students in *Tinker*—could not be suppressed absent a showing that it would "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. According to the Court, neither the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" nor "an urgent wish to avoid the controversy which might result from the expression," are sufficient to strip public school students of their First Amendment rights. *Id.* at 509-10. Although not specifically emphasized by the Court, the speech in *Tinker* was undeniably core political expression: the students used the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example influence others to adopt them." *Id.* at 514.

In the forty years since *Tinker*, this Court has expanded on its school speech jurisprudence in just a handful of cases. Each of those cases does two things: (1) it upholds a prohibition on student speech that is divorced from the political and religious expression at the heart of the First Amendment; and (2) it reaffirms the central holding of *Tinker*—that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the educational process.

Thus in *Bethel School District v. Fraser*, the Court upheld a school district's decision to suspend a student that gave a lewd speech at a school assembly, but it did so only after reaffirming the basic premise of *Tinker*—that students do not shed their First Amendment rights at the school gate—and noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's speech] in this case." 478 U.S. 675, 679-80 (1986). Similarly, in *Hazelwood School District v. Kuhlmeier*, the Court again reaffirmed the "standard articulated in *Tinker* for determining when a school may punish student expression," but went on to hold that this standard does not extend to situations where a school refuses to *sponsor* student expression. 484 U.S. 260, 272-73 (1988). The student newspaper was part of the school's curriculum, and faculty provided oversight. *Id.* at 268-70.

Most recently, in *Morse v. Frederick*, this Court held that public schools may prohibit speech advocating unlawful drug use. 551 U.S. 393, 410 (2007). But it did so only after distinguishing the advocacy of unlawful drug use from the "essential facts of *Tinker*," which "implicat[ed] concerns at the

heart of the First Amendment," namely core political and religious expression. *Id.* at 403. And once again, the Court reaffirmed, in unqualified terms, the central holding of *Tinker*: that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 403 (quoting *Tinker*, 393 U.S. at 513). Indeed, in a concurring opinion, Justice Alito, joined by Justice Kennedy, applauded the majority for "correctly reaffirm[ing] the recognition in [*Tinker*] of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 422.

The *Tinker* Court expressly refused to limit its holding to the narrow confines of viewpoint discrimination. Of course the Court said that it would be unconstitutional for the school to prohibit expression "of opposition to" the war in Vietnam. *Tinker*, 503 U.S. at 513. But the Court also said that it would be unconstitutional for the school to forbid "all discussion of the Vietnam conflict," *id.*, a rule that would be viewpoint neutral. And the Court said of students that "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . ." *Id.* This describes an affirmative right to speak, not merely a right to be free of discrimination with respect to the contents of his speech. A rule prohibiting all speech in the cafeteria would be a content-neutral rule, but *Tinker* says that such a rule would be unconstitutional.

This conclusion follows from *Tinker*'s central premise that students do not shed their rights at the

schoolhouse gate. The students in *Tinker* were in a place where they were entitled to be (indeed, required to be), and they were speaking entirely with their own resources. They did not seek to use a public address system, bulletin board, or other school facility, or to reserve a classroom or other space where they were not already entitled to be. So there was no issue of public forum or access to school property. The only question was whether the school could silence the student's nondisruptive speech. At least in that context, they were entitled to speak in any place they were entitled to be—in the classroom, the cafeteria, the playing fields, or anywhere else on the campus, so long as they did so nondisruptively. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 47-48 (1986).

If a student's speech threatened material disruption, the school could regulate it. If a student sought to use school facilities or resources (beyond the spaces he was entitled to occupy), additional issues would be presented, and content-neutral rules might appropriately regulate access. Subsequent cases clarified that school-sponsored speech is not the student's own speech, and thus is not free, and that schools may regulate content that is seriously inappropriate for young students and not necessary to the advocacy of any political or religious idea. Taken as a whole, then, *Tinker* and its progeny establish a workable framework for balancing the needs of educators to maintain order in their classrooms with the unquestioned First Amendment rights that students carry with them into the schoolhouse: Core political and religious speech, in a place where the student is entitled to be, cannot be

suppressed absent a showing that such speech substantially and materially disrupts the educational process.

II. THE FEDERAL COURTS OF APPEALS HAVE EXPRESSED DEEP CONFUSION OVER THE PROPER SCOPE OF *TINKER*.

Despite the clear framework established by this Court's school-speech jurisprudence, the Courts of Appeals have expressed deep confusion over the application of *Tinker*'s rule in the context of content-neutral regulations. The Second Circuit has said that "It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination." *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006). The Third Circuit has stated that all student speech that is not lewd, vulgar, or profane under *Fraser* or school-sponsored under *Hazelwood*, "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.).

But the Sixth and Ninth Circuits have said that *Tinker* does not apply beyond the narrow context of viewpoint discrimination. The Sixth Circuit has held that *Tinker* does not apply to policies that "merely [seek] to regulate the time, place, and manner" of student speech. *M.A.L. v. Kinsland*, 543 F.3d 841, 849 (6th Cir. 2008). The Ninth Circuit has said that "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech

should be analyzed, thereby leaving room for a different level of scrutiny." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008).

The Fifth Circuit in this case further deepened this confusion and created yet another approach to student speech that effectively reverses *Tinker's* protection of nondisruptive political and religious speech.

III. THE FIFTH CIRCUIT RULE THREATENS POLITICAL AND RELIGIOUS SPEECH AT THE CORE OF THE FIRST AMENDMENT.

The Fifth Circuit's decision threatens to eviscerate whatever student-speech protections exist under *Tinker* by joining together two separate Fifth Circuit precedents—a broad exception to *Tinker* and an incorrect understanding of content-neutrality—in a way that affords schools virtually unlimited discretion to restrict student speech. While the Constitution certainly permits schools to impose dress codes, it also requires that those dress codes not restrict nondisruptive political and religious speech. The Fifth Circuit's decision casts aside this critical distinction.

The Fifth Circuit first seeks to elevate content-neutral speech restriction alongside the recognized restrictions on disruptive, lewd, school-sponsored, and drug-related student speech as a permissible exception to *Tinker's* protections. But the Fifth Circuit also crafts an accompanying definition of content-neutrality so broad that—if allowed as a permissible exception to *Tinker*—it would provide schools largely unfettered ability to pick and choose which student speech to allow and which to forbid.

Such discretion would strip *Tinker* of any continued relevance. More troubling still, it is highly likely that important political and religious speech would ultimately bear much of the brunt of the discrimination.

A. The Fifth Circuit Seeks to Elevate Content-Neutral Speech Discrimination Alongside the Other Exceptions to *Tinker*.

According to the Fifth Circuit, content-neutral speech regulation is an independent exception to *Tinker*, relieving school officials of any obligation to permit nondisruptive political or religious speech or to tailor prohibitions on speech in any meaningful way. *See* App. 7-8 (rejecting Palmer's interpretation of *Tinker* "because it fails to include another type of student speech restriction that schools can institute: content-neutral regulations."). The Fifth Circuit based that determination largely on its own prior precedent in *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001), in which it upheld a school uniform code against a First Amendment challenge. In that case, the Fifth Circuit made the same fundamental error as the Sixth and Ninth Circuits—somehow transforming *Tinker* into a narrow protection against only viewpoint discrimination. This is deeply mistaken.

The rule established in *Tinker* was simple: when students are where they belong on the campus, schools can stop them from speaking about topics at the heart of the First Amendment only if their speech is disruptive. *Tinker*, 393 U.S. at 513. Importantly, subsequent decisions of this Court approving narrow restrictions on student speech did not overrule this

basic premise. To the contrary, those decisions recognized the continued vitality of *Tinker*'s broad protection. *See, e.g., Morse*, 551 U.S. at 422 (Alito, J., concurring) (joining opinion "on the understanding" that it was confined to the advocacy of illegal drug use and that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue").

In short, if student speech comments on a political or religious issue and is not disruptive, school-sponsored, lewd, or advocating illegal drug use, it cannot be suppressed. Of course, the existing exceptions are probably not exclusive and the Court may recognize other, similarly narrow exceptions to *Tinker* in the future. *See* Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 112 (2008) ("[I]t is quite reasonable to infer that there will be more cases upholding restrictions on student speech in the future. Especially in the absence of any coherent principle [for identifying exceptions], another *Tinker* 'exception' is likely to emerge whenever school censorship seems reasonable to the Court."). But none of this Court's limitations on *Tinker* have threatened the basic rule that non-disruptive student speech on core First Amendment topics is protected. The approach adopted by the Fifth Circuit here is far more than an exception; it is a transformation. The Fifth Circuit's proposed "exception" represents an altogether new rule under which even core political speech that poses no discernible threat of disruption can be completely and thoroughly driven off school grounds at the whim of administrators, so long as they do so under the guise of content-neutral speech

regulation. This is in direct conflict with this Court's precedent.

Content-neutral regulation of speech is not so obviously dangerous as viewpoint discrimination, but even so, content-neutral rules deserve serious judicial review, because they can easily be used to achieve substantial suppression of free speech. To restrict or prohibit discussion of controversial topics is to insulate the status quo from criticism. To restrict or prohibit all discussion is necessarily to restrict or prohibit discussion of controversial topics. To confine speech to one or a few times, places, or manners can easily be to render speech ineffectual and irrelevant. This Court in *Tinker* was alert to such dangers. The Court warned that free speech is not "to be so circumscribed that it exists in principle but not in fact." *Tinker*, 503 U.S. at 513.

This Court's public-forum doctrine is a set of content-neutral rules.[3] And as Justice Kennedy once said in criticizing certain features of that doctrine, "it leaves the government with almost unlimited authority to restrict speech on its property by doing

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[3] Indeed, the school tried to shelter under public-forum doctrine here. The dress code in this case proclaims the high schools to be "a closed forum for student expression through student attire." App. 30. But this misapplies the doctrine. The students are required to be at school, and their attire is not school property or a school facility; suppression of messages on the student's own clothing is not a regulation of access to government property for purposes of speech, and thus not within the domain of the public-forum doctrine. The school could as easily declare itself "a closed forum for student expression through oral communication," or "a closed forum for student expression," period. If the school could close "forums" that do not require access to its own property or facilities, it could suppress all speech by fiat, with not even a shadow of judicial review.

nothing more than articulating a non-speech-related purpose for the area." *ISKCON v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment). Instead of giving the government unreviewable power to designate forums as open or closed "by fiat," *id.* at 694, Justice Kennedy proposed an "objective" inquiry "based on the actual, physical characteristics and uses of the property." *Id.* at 695. *Tinker* specifies that inquiry in school cases: whether student speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 399 U.S. at 513.

B. The Fifth Circuit's Definition of Content-Neutrality Is Wrong and Greatly Expands Its Assault On *Tinker*.

As explained above, the Fifth Circuit's elevation of content-neutral speech regulation to excepted status under *Tinker* eviscerates *Tinker*. The Fifth Circuit's decision, however, goes further still by adopting a definition of content-neutrality that allows schools to overtly distinguish between different categories of speech—indeed, to undertake content-based and even viewpoint-based regulation—yet still enjoy the relaxed scrutiny generally extended to content-neutral regulation. Those two principles together threaten to render *Tinker* irrelevant and to drive the First Amendment from the public learning environment.

To be clear, school districts are fully entitled to enact dress codes. But the rules at issue in this case are no ordinary dress code. They do not regulate clothing as clothing; rather, they target messages and

they expressly distinguish those messages on the basis of viewpoint:

> [S]tudent clothing should be free of any slogans, words or symbols except those that promote the school district and its instructional programs.

App. 30-31. In other words, the policy expressly favors and even encourages speech that promotes the school's interest, and it prohibits all other speech. Under this rule, the student could be wearing a coat and tie, but if his tie displays a word or a symbol that does not promote the school district, he is in violation of the "dress" code.

Moreover, students who display approved messages get exempted from other parts of the dress code. The general rule requires polo shirts, collared shirts, or blouses; t-shirts are not permitted. App. 31. But students *may* wear "campus principal-approved WISD sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts *or t-shirts*." *Id.* (emphasis added). So t-shirts are permitted if, and only if, they display an officially approved message that promotes the school or one of its activities.

In sum, no messages are permitted on clothing except those that promote the school district and its programs, and those who display such supportive messages are awarded special privileges. Yet according to the Fifth Circuit, these are content-neutral rules. Even though they expressly discriminate on the basis of viewpoint, they are said

to be content neutral because the school did not have a constitutionally prohibited motive. "The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." App. 13, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And of course, the burden of proving bad motive falls on plaintiffs, motive is often easy to hide, and federal judges are reluctant to accuse school officials of bad motive. If overt viewpoint discrimination is content neutral unless the plaintiff proves bad motive, little is left of freedom of speech.

The Fifth Circuit's quotation from this Court's opinion in *Ward* is accurate but out of context. *Ward* involved a restriction on the volume of sound; the restriction applied to any band that used the bandshell no matter what music they were playing. That regulation was objectively content neutral. Even so, if plaintiffs could show that this seemingly neutral regulation had been adopted out of disagreement with the band's message (or perhaps with the message of rock bands more generally), it could be treated as content based rather than content neutral. Similarly in *Hill v. Colorado*, 530 U.S. 703, 719 (2000), where the Court quoted the statement from *Ward*, the rule on its face applied to any conceivable message delivered near a health center. There was no content discrimination in the rule itself; the issue was whether it was motivated by hostility to abortion protestors or gerrymandered to single them out.

The rule at issue here is radically different. With respect to messages on clothing, the rule is that

students are silenced unless they are promoting the incumbent administration and the programs it sponsors and approves. There is no need to demand evidence of subjective motive; when the rule facially discriminates on the basis of content, it is not content neutral. The rule expressly distinguishes between favored speech—pro-school speech—and disfavored speech—everything else. Such a policy epitomizes content-based speech regulation.

As this Court has made clear, a rule is content-based if it prefers certain kinds of speech. *See Regan v. Time Inc.*, 468 U.S. 641, 647-49 (1984) (finding ban on the use of photographic reproductions of currency to be content based, and unconstitutional, where there were exceptions for "philatelic, numismatic, educational, historical, or newsworthy purposes"); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (finding complete ban on all picketing, with lone exception for labor picketing, to be unconstitutional); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972) ("Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject.").

Of course, a school clearly has an interest in promoting its own programs and organizations, but it cannot pursue that policy by censoring all speech that fails to promote that interest. The practice itself—of effectively restricting all speech and then selectively allowing exceptions that the District believes are reasonable—inevitably places the District in the position of favoring certain categories of speech over others. An exception for promoting the school's interests might appear innocuous, or a rule that prohibits all speech except for speech promoting

the school might appear Big Brotherish, depending on the frame of reference. But even if one views this exception as innocuous, it is perched atop a very slippery slope.

By making that initial distinction, the District has already engaged in viewpoint-based discrimination. The District is not permitting the *category* of speech concerning the District itself and its clubs, teams and programs; it is permitting only the pro-school viewpoint. If a student wished to wear a shirt bearing the logo of a rival school's athletic team, for example, such speech would be prohibited under the existing policy. If a student wore a shirt criticizing some school policy, that speech would be prohibited because it would neither "promote" the school district nor support a club, organization, team, or school spirit. App. 30-31. These rules are viewpoint-based discrimination.

The possible exceptions that a school might make to its policy—while still remaining content-neutral according to the Fifth Circuit—are limited only by the preferences of the school administrators tasked with making them. For example, an agricultural club might be permitted to wear shirts that support farming and agricultural efforts; an art club may be permitted to wear shirts depicting famous works of art; members of the Jazz band might be permitted to wear shirts depicting Louis Armstrong and Charlie Parker. Once again, according to the Fifth Circuit, all of these exceptions could be made and the policy would nevertheless remain content-neutral so long as all remaining speech is restricted. Each exception would be motivated by *agreement* with the excepted message; nothing would be provably motivated by

*dis*agreement with the messages subject to the general ban. The seemingly inevitable final destination of such an approach is that a school may simply restrict all speech at the outset then selectively make exceptions one at a time until the district has exempted all the speech it approves and restricts only the speech that it chooses not to approve.

C. The Decision Below Is Aggravated by the Unlimited Discretion Vested in School Officials by the School's Rules and by the Fifth Circuit's Standard of Review.

The problem is aggravated further by the vesting of the decision-making authority in the "campus principal" without further direction. App. 12, 31. Despite the claims of content-neutrality, such a policy is ultimately a restriction on speech not deemed worthy of an exception by a single school administrator unilaterally applying his or her own personal preferences and unspoken criteria. Such an approach is content-based—and indeed often viewpoint-based—discrimination and is strictly forbidden under *Tinker*. Indeed, such unguided discretion to approve or disapprove of private speech has been constitutionally prohibited since long before *Tinker*. *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *see also Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir. 2006) ("The Supreme Court has long held that the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum.")

(citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-33 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769-72 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)); *Southworth v. Bd. of Regents*, 307 F.3d 566, 592 (7th Cir. 2002) (on remand) (invalidating policy granting decision makers unbridled discretion and thereby permitting viewpoint discrimination).

Nor did the Fifth Circuit hold these school principals to any objective standard in its standard of judicial review. Although the court below went through the motions of requiring that the restrictions on speech serve an "important or substantial government interest," "unrelated to the suppression of student expression," and that the restrictions be "no more than necessary to facilitate that interest," App. 14, in practice, it gave total deference to the school. Indeed, the mere invocation of a laundry list of educational goals—from improving test scores to an "orderly learning environment" to "encouraging professional dress"—qualified as important and substantial government interests. *Id.* at 15-16. The court explicitly "set a low bar for the evidence" required to show that the restrictions on speech were no more restrictive than necessary to achieve these goals. According to the court, studies are not required, and "[t]he sworn testimony of teachers or administrators would . . . suffice." *Id.* Even though important First Amendment rights were at stake, the court simply took the school's word for it.

Rather than properly address the specific rules about speech, including the promotion of favored speech, the court relied on broader testimony and

evidence from other cases to the effect that dress codes improve discipline and learning outcomes. That may be true, but it is not the issue here. Plaintiffs do not challenge the whole dress code, or even very much of it. They challenge only the express ban on "slogans, words or symbols" that do not "promote the school district and its instructional programs." *Id.* at 30-31. The court below cites no testimony that the ban on "slogans, words or symbols" improved discipline or achievement, let alone testimony that the restrictions on speech were "no more than necessary" to achieve the school's interest. By treating this as a dress code case, the court largely ignored the real issue, which is express restrictions on speech coupled with overt promotion of favored speech and viewpoints.

IV. NONDISRUPTIVE POLITICAL AND RELIGIOUS SPEECH WILL LIKELY SUFFER THE GREATEST DISCRIMINATION.

By melding together its extraordinarily deferential standard of review and its two faulty precedents—the content-neutrality exception to *Tinker* and the expansive reading of content neutrality—the Fifth Circuit has set in place an approach to student speech that effectively flips *Tinker* upside down. Whereas under *Tinker* all student speech is presumptively protected at the outset and the schools and courts must identify specific exceptions to that protection on a case-by-case basis, under the Fifth Circuit approach all student speech may be presumptively restricted and the schools alone are empowered to make the discretionary determination of what speech to permit

on a case-by-case basis. Under such an approach, the most certain casualty will be speech that is in any way controversial. Rather than risk complaints from students, teachers, or citizens who disagree with some controversial student speech, the easy course in many districts will be to suppress all controversial speech and thus avoid all controversy. Political and religious speech is among the speech most likely to be controversial, for the obvious reason that people disagree about politics and religion. It is that very disagreement that will motivate some students to speak out and others to complain.

Religious speech has been a particular source of confusion, and is particularly at risk, because of the distinction between governmental and private religious speech. Private religious speech, like political speech, "is at the core of the First Amendment." Douglas Laycock, *High-Value Speech*, 12 LEWIS & CLARK L. REV. 111, 123-24 (2008); *see Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince."). This Court has repeatedly held that private religious speech is protected in public schools. *See, e.g., Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same issue at university level). Despite this, "[s]chools have repeatedly claimed that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from

their own confused definition of their mission." *Laycock*, *supra* at 124. "Because the Establishment Clause prohibits *schools* from promoting religion, some schools conclude that any *student* speech promoting religion is inherently inconsistent with the educational mission of the school." *Id.* at 125. Just as some school administrators resist this Court's decisions restricting school-sponsored prayer, and try to inject as much religion as they can into the school's own speech, other school administrators resist this Court's religious-free-speech decisions and seek to suppress all mention of religion lest they be accused of encouraging or promoting religious speech.

The rule at issue here aggravates this problem. Under a student-speech approach in which schools may first presumptively restrict all speech, and then make case-by-case exceptions to allow certain speech, there is a suggestion—at least to some—that the school is sponsoring or supporting whatever limited speech it permits. This is certainly the situation in the case below in which the District permits only speech that promotes the school and its programs. App. 12. Under that scheme, school administrators would be concerned that making a "special exception" to permit religious speech would, in effect, constitute a school endorsement of such speech and run afoul of the Establishment Clause. This fear might persist even if a school had already perforated its policy with other exceptions. Accordingly, an exception for private religious speech might be among the least likely to actually be made, despite the highly protected character of religious speech.

While the approach adopted by the Fifth Circuit is offensive to student speech rights in general, it is potentially especially hostile to the

speech that is constitutionally most important. If schools can presumptively suppress all student speech and permit only what they explicitly approve, controversial political speech has little chance for approval, and religious speech may have even less chance. Yet the First Amendment is most essential when our people disagree on important matters of politics or religion.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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APPENDIX

INTERESTS OF THE AMICI

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts—including in a variety of First Amendment cases, as well as in others involving student rights. Cato files the instant brief to address the need to clarify constitutional speech protections in the face of heavy-handed government regulations.

The Institute for Justice (IJ) is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the

country and around the world. In particular, the Becket Fund has vigorously advocated for the right of religious individuals and institutions to express their beliefs freely and peacefully.

The Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. Through its Center for Law & Religious Freedom, CLS works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations. CLS frequently defends the religious freedom of its law student chapters and other student religious groups in public education settings.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. Recognition that religious speech is often the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). NAE believes that protection of religious speech is imperative. NAE also believes that religious freedom is a gift of God, and its protection is vital to limiting the government that is our American constitutional republic.